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No. 91-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., *et al.*,

Petitioners,

—v.—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's *Penn Central* decision (438 U.S. 104 [1978]) preclude an as-applied Takings Clause challenge to a landmark designation?

2. In determining whether the interior and exterior landmarking of certain theatres constitutes a compensable taking, should a court apply solely a bright-line test as to whether all value has been destroyed, or must there be a review of all relevant factors, including, where necessary, fact-finding (or remand for fact-finding) on disputed issues of material fact?

3. Are the police-power and equal protection limitations upon governmental real property regulation, which inhere in the requirement of a comprehensive plan, satisfied in landmarking in general, or in New York City's landmarking ordinance in particular?

4. Does a Special Demolition Permit requirement, applicable only to a handful of specified properties, effectively prohibiting any change in their use while neighboring properties remain unrestricted, constitute unconstitutional reverse spot-zoning?

LIST OF PARTIES

The parties to the proceeding below appear in the first footnote.* Petitioners are all the original plaintiffs. Respondents other than Save The Theatres, Inc., are all the original defendants. Respondent Save The Theatres, Inc., was originally not a party, but was granted leave by the trial court, first to appear as *amicus*, and then to intervene.

None of the corporate parties has publicly traded stock. The information required by this Court's Rule 29.1 is set forth in the second footnote.**

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* Petitioners are The Shubert Organization, Inc., Nederlander Organization, Inc., Jujamcyn Theaters Corporation, The League of American Theaters and Producers, Inc., Nederlander Amusement Corp. of Maryland, Nederlander Theatrical Corp., All State Amusement Co. of Illinois, Inc., Hellinger/Nederlander 46th Street Corp., Lunt Theatre Co. (a New York general partnership), Rose Nederlander Associates, Inc., Alvin Nederlander Associates, Inc., and 239-247 West 45th Street Corp.

Respondents are Landmarks Preservation Commission of the City of New York, City Planning Commission of the City of New York, Board of Estimate of the City of New York, The City of New York, and Save The Theatres, Inc.

** Petitioner The Shubert Organization, Inc., is a wholly-owned subsidiary of The Shubert Foundation, Inc., a not-for-profit corporation fostering the theatre arts. Petitioner The Shubert Organization, Inc., owns a one-half interest in petitioner 239-247 West 45th Street, Inc., together with a one-half interest owned by the Estate of Irving Berlin. Petitioners Nederlander Amusement Corp. of Maryland, Nederlander Theatrical Corp., All State Amusement Co. of Illinois, Inc., Hellinger/Nederlander 46th Street Corp., Rose Nederlander Associates, Inc. and Alvin Nederlander Associates, Inc., are all wholly-owned subsidiaries of petitioner Nederlander Organization, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the May 16, 1991, decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the judgment of the *nisi prius* court dismissing petitioners' complaint.

OPINIONS BELOW

The opinion and order (one paper) of the New York Appellate Division, dated May 16, 1991, is reported at 166 A.D.2d 115 and at 570 N.Y.S.2d 504, and is reproduced in the appendix hereto at App. 1a.

The opinion of the court of original instance, dated December 5, 1989 (New York Supreme Court, New York County, Hon. Irma Vidal Santaella, J.), is not reported. It is reproduced in the appendix hereto at App. 9a.

The refusals of the New York Court of Appeals to entertain an appeal from the order of the Appellate Division, dated September 19, 1991 (dismissing appeal purportedly taken as of right) and December 18, 1991 (denying discretionary leave to appeal) are respectively reported at 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456 and at ___ N.Y.2d ____, ____ N.E.2d ____, ____ N.Y.S.2d ____. They are both reproduced at App. 43a.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and order of the New York Supreme Court, Appellate Division, First Judicial Department, dated May 16, 1991, which affirmed dismissal of their complaint. The New York Court of Appeals, on September 19, 1991, dismissed an appeal purportedly taken as of right from the said order of the Appellate Division, and on December 18, 1991, denied discretionary review.

This Court has jurisdiction to review by writ of certiorari a final judgment or decree rendered by the highest court of a State in which a decision could be had, where a title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States (28 U.S.C. § 1257[a]).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "private property [shall not] be taken for public use without just compensation." The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall deprive any person of

. . . property without due process of law, or deny any person within its jurisdiction the equal protection of the laws."

The Landmarks Law of the City of New York (N.Y.C. Admin. Code, Title 25, C.3), is set forth in relevant part at App. 44a.[1] Relevant parts of New York City's Zoning Resolution are reproduced at App. 81a.

STATEMENT OF THE CASE

In May 1982, the New York City Board of Estimate promulgated regulations affecting solely forty-four named theatres in the Broadway theatre district (the "Listed Theatres"), prohibiting their demolition unless a Special Demolition Permit issued upon a showing either that the theatre was unsafe, or that demolition would not hurt the entertainment sector of the City's economy (Zoning Resolution 81-742 [1982], App. 81a, *infra*). At the same time, the Board of Estimate also mandated that the City Planning Commission develop a comprehensive plan to strengthen the theatre industry, including "actions" of the Landmarks Preservation Commission (Zoning Resolution 81-74 [1982]). Simultaneously, the Landmarks Preservation Commission announced a public hearing on the proposed landmarking of the Broadway theatres. After three days of hearings in 1982, the Commission in November 1987-January 1988 issued forty-seven landmark designations affecting twenty-eight theatres (nineteen as to both exterior and interior, two as to exterior only, and seven as to interior only).[2] Of these twenty-eight theatres,

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1 Among the declared purposes of the Landmarks Law are to "protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided" (§ 25-301[b], *infra* at App. 45a).

2 No transcript had been made of the 1982 hearings, and none would be made until after this action was commenced in May 1989, although seven of the eleven commissioners had changed before the landmark designations here in issue were made.

twenty-two (involving thirty-nine designations) are owned and operated by petitioners, and are the subject of this action.[3]

The Board of Estimate approved *en masse* these forty-seven designations without change on March 10, 1988. The three theatre-owner organizations (Shubert, Nederlander, Juyamcyn) were first given five minutes each (*i.e.*, an average of nineteen seconds per designation) to be heard.

Petitioners timely sought judicial review of the designations, as provided under New York procedure, in the trial-court (New York Supreme Court, New York County) on constitutional and other grounds, and sought damages. Since the Landmarks Preservation Commission had expressly refused to consider economic evidence,[4] petitioners presented to the trial court evidence that, in particular, interior landmarking (twenty-one of the twenty-two theatres landmarked had their interiors designated) interfered with and cost burdened continued use of these buildings as theatres.[5] The trial

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3 Two of the Listed Theatres had been landmarked before 1982. Two more were landmarked in 1982, three in 1985, and one in 1987 before the ones here in issue. The balance of the Listed Theatres were either not considered for designation, or not designated.

4 See remarks of Landmarks Commission Chairman Norman at Commission Meeting of December 9, 1986 (App. 84a):

> "[A]s you know, the Commission does not look to cost in terms of how these things are replaced or changes made on a building. . . . . So the argument that cost should be considered by the commission, I have rejected."

5 An interior landmark designation interferes with the owner's ability to adapt the theatre to changing productions. The full adverse impact of these interior designations has been averted (so far) by the willingness of the Landmarks Commission, although unauthorized by law to do so, to overlook production-related changes, provided, however, that the owner pledges to restore it to its "original" (*i.e.*, moment of designation) condition at the end of the show's run, regardless of (i) cost, (ii) the necessity of the inevitable new production-related changes when the next show moves in, and (iii) the fact that the public will have no "benefit" from the "restored" interior in the interim while the theatre is dark. While this informal relaxation of the rules is still confis-

court declined to hold an evidentiary hearing[6] or otherwise make findings on this point, because, it erroneously held, the agency below (where the evidence was not presented and which had expressly refused to consider economic evidence) had already ruled on the question (see trial court opinion at App. 27a, *infra*).[7]

The trial court also dismissed, without an evidentiary hearing, petitioners' damage claims, and did not even discuss, much less rule upon, the petitioners' claim that the transferable air rights—accorded petitioners by virtue of the landmark designations—were without value, because of a lack of buildable sites within the receiving zone which could utilize such rights.

On appeal, the Appellate Division of the Supreme Court affirmed (App. 1a). The Takings Clause challenge was disposed of summarily (App. 7a):

> "Since the [United States] Supreme Court in *Penn Central*, *supra* [438 U.S.] at 138, clearly ruled that the application of the Landmarks Law does not affect a tak-

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catory in the long run, the toleration by the Commission of production-related changes is legally irrelevant. An attack upon the validity of formally promulgated rules may not be avoided merely because the agency announces it will not enforce the rules to their full extent (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136 [1967]).

6 Indeed, it even held, erroneously, that it was not empowered to hold an evidentiary hearing on any of the issues.

7 The trial court's refusal even to consider this question, of course, precluded evaluation by it of whether there was the substantial advancement of legitimate state interests as required by this Court's decisions (*see Nollan* v. *California Coastal Comm'n.*, 483 U.S. 825, 834 [1987]; *Agins* v. *Tiburon*, 447 U.S. 255, 260 [1980]; *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 127 [1978]). Neither preservation of theatre buildings (the Landmark Commission's professed goal) nor preservation of the theatre industry (what petitioners contended, and amply demonstrated below, was the Commission's true goal, an admittedly illegal one for the Commission under New York law) is substantially advanced by designations which may prevent the continued use of the theatre buildings as theatres.

> ing of the property, the constitutional challenge thereby is resolved. Furthermore, under the standards set forth in [certain New York cases], the petitioners have not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres denies them essential use of their property."

The Appellate Division (contrary to the trial court) also held that, in the absence of final agency action on applications by petitioners for renovations or alterations, the claim of impairment of economic use was not ripe for review.[8] As to air rights, the Appellate Division merely observed that such rights inured to petitioners by virtue of the designations, and that, "absent a successful challenge, [the rights] must be presumed to have economic benefit" (App. 7a). It made no mention of petitioners' contention, never passed upon at any level, that such rights had no value whatsoever because of the lack of receiving sites which could use them. The Appellate Division (and the court below) also failed to address petitioners' claim of discrimination, in that other similarly situated theatres were not landmarked.

The New York Court of Appeals dismissed an appeal purportedly taken as of right (App. 43a), and denied leave for a discretionary appeal (App. 43a).

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8 This conclusion ignored the fact that *Penn Central* (at 132) had questioned the right of appellants there to challenge the consequences of designation, as they had not challenged the act of designation when it was made.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES THE QUESTION OF THE PROPER APPLICATION OF *PENN CENTRAL* AND ITS PROGENY TO AS-APPLIED TAKINGS CLAUSE CHALLENGES

Perhaps influenced by the fact that the landmarks law in issue here (New York City's) is the same one as was involved in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and that the Takings Clause challenge there was rejected, the New York Appellate Division, in the case at bar, in a one-sentence discussion, ruled that "the constitutional challenge thereby is resolved" (App. at 7a). Of course, *Penn Central* never purported to settle for all time the constitutionality of *every* designation under New York City's local law; indeed, it expressly did not even purport to settle for all time the constitutionality of the very designation there in issue, that of New York's Grand Central Terminal. As the Court there noted, "We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion" (Footnote 36 at p. 138).

While the *Penn Central* Court considered, and rejected, a challenge to New York City's landmarks law on its face, it expressly noted that this was "not. . . the end of our inquiry" (at 135), and acknowledged its duty to consider "the question of the severity of the impact of the law on appellant's parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site" (at 136). Plainly, the *Penn Central* Court did not rule that landmarking could be challenged only upon a showing that a designation *totally destroyed* the value or use of the property.[9]

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9 In its earlier discussion of the questions presented, the *Penn Central* Court had identified two, namely (1) whether there had been a taking,

In identifying the factors it considered relevant to its particular inquiry, the *Penn Central* Court certainly did not intend to create a bright-line test as to when a regulatory "taking" has occurred. Indeed, *Penn Central* itself noted the inability to develop any set formula for such cases (at 124). This is completely in keeping with the takings jurisprudence of this Court, as developed both before and subsequent to *Penn Central. See Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *Bowen* v. *Gilliard*, 483 U.S. 587 (1987); *Hodel* v. *Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 (1987); *MacDonald Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979).

As this Court (per O'Connor, J.) noted relatively recently (*Hodel* v. *Irving*, 481 U.S. 704, 713-4 [1987]):

> "The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. [Citations omitted]. As THE CHIEF JUSTICE has written:
>
> > '[T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the gov-

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and "(2) if so, whether the transferable development rights afforded appellants constitute 'just compensation' within the meaning of the Fifth Amendment," and added that it needed to discuss only the first question. Nonetheless, the Court did (at 137) address the air rights, which had been stipulated to be valuable. Subsequent decisions of this Court, applying the two-component test of a regulatory taking claim enunciated in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 348 (1986) (an owner must establish that [i] the regulation has "taken" his property, and [ii] any proffered compensation is not "just"), have treated *Penn Central* as containing an alternative holding that the value of the air rights prevented a showing of lack of just compensation. See the treatment of *Penn Central* in *MacDonald, supra* at 350, and in *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172, 187 (1985).

> ernment, rather than remain disproportionately concentrated on a few persons." [*Penn Central Transportation Co.* v. *New York City*, 438 U.S.] at 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance. *Ibid.*' *Kaiser Aetna* v. *United States*, *supra*, [444 U.S. 164] at 175 [1979]."[10]

Insofar as a particular factor is a subject of factual dispute not yet resolved, the facts would have to be found, even if no formal fact-finding below was required (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 [1971]), for effective judicial review of administrative actions requires reasoned findings (*Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87 [1968]). Depending on the circumstances and the jurisdiction of the courts and agencies involved, "there may be independent judicial factfinding when issues that were not before the agency are raised" (*Overton*, *supra* at 415), or, if the reviewing court itself cannot make findings, it may remand to a trial court (as was done in *Overton*) or to the administrative agency (*Pension Benefit Guaranty Corp.* v.

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10 Yet another factor which must be here weighed is whether the political unaccountability of the landmark designations, because they are without cost to the public, has here caused a toleration of unworthy designations, thus vitiating the police-power basis of allowing such restrictions to begin with. "The politically attractive feature of regulation is not that it permits [results] to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes" (Scalia, J., concurring in part and dissenting in part in *Pennell* v. *City of San Jose*, 485 U.S. 1 at 22 [1988]). There can be no question that New York City's Landmarks Commission would not have here proceeded with such a heavy hand if it had had to cost-justify forty-seven designations. Indeed, an architect member of the Commission admitted that many of the theatres here designated were architecturally "no great shakes" (App. 85a).

LTV Corp., ____ U.S. ____, 110 S.Ct. 2668 [1990]; *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 [1985]), as appropriate.

The New York courts have thus clearly misread *Penn Central* and other controlling authorities of this Court, when they refuse to engage in the "ad hoc, factual inquiries" (*Kaiser Aetna*, *supra* at 175) mandated by this Court, and instead apply a simplistic bright-line test, to determine whether a compensable taking has incurred. This Court ought therefore grant a writ of certiorari to make manifest the method of application of Takings Clause case principles in the landmarking context.

THIS CASE INVITES THIS COURT, IF THE COURT DEEMS IT APPROPRIATE, TO REVIEW LANDMARKS LAW'S PLACE WITHIN TAKINGS CLAUSE JURISPRUDENCE

While, as noted above, petitioners contend that no aspect of *Penn Central* need be called into question either for this case to merit review by certiorari, or for petitioners to prevail upon such review, nonetheless this case does afford this Court the opportunity, if the Court deems it appropriate, to reconsider the constitutional and logical pinnings of landmark designations in general, or of *Penn Central* in particular.

The affirmative power of governments to designate properties as landmarks, and thereby restrict or limit the rights of ownership, is not here disputed.[11] "It is a separate question, however, whether an otherwise valid regulation so frustrates

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11 Petitioners do dispute (unlike the appellants in *Penn Central*) whether the designations here are appropriate to the public purposes supposed to be served; whether the properties are capable of earning a reasonable return; whether they can continue to be used for their historic purpose; whether the transferable air rights conferred are valuable; and the "specific factual premises" below (or, more precisely, the failure to find facts). Compare *Penn Central* at 129, where it is stated that none of these points was there in dispute.

property rights that compensation must be paid" (*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]). As Justice (now Chief Justice) Rehnquist noted in his dissenting opinion in *Penn Central* (n. 14 at 152), "[M]any States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results."

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 [1922]). The Fifth Amendment's Just Compensation Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong* v. *United States*, 364 U.S. 40, 49 [1960]).[12] The principle is generally satisfied when there is "an average reciprocity of advantage" (*Pennsylvania Coal*, *supra* at 415), when "[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality but also for the common benefit of one another" (Rehnquist, J., dissenting in *Penn Central*, at 140; *see also Hodel* v. *Irving*, 481 U.S. 704 [1987]; *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 [1987]). This "average reciprocity of advantage" is usually accomplished by a comprehensive plan, as in a community-wide zoning ordinance (*Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 [1926]). This, however, is absent in landmarking in general, and in New York City's landmarking ordinance in particular. As the New York Court of Appeals observed in considering this ordinance in *Penn Central*, 42 N.Y.2d 324,

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12 In terms of the case at bar, the *Armstrong* question is whether it is petitioners or the public as a whole who should, in all fairness and justice, bear the cost of regulations which (i) are designed in part at least to foster public interests by attracting tourists and visitors and thereby stimulate the City's business and industry (see Footnote 1, *supra*), and (ii) by no stretch of the imagination regulate anything which could be called a nuisance (*cf. Lucas* v. *South Carolina Coastal Council*, No. 91-453, *cert. granted*).

329-330, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd.*, 438 U.S. 104 (1978):

> "Restrictions on alteration of individual landmarks are not designed to further a general community plan. Landmark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble 'discriminatory' zoning restrictions, properly condemned".

The New York Court of Appeals' analysis discloses the fatal flaw in New York's scheme of landmarking—the absence of the requisite "average reciprocity of advantage." Upon appeal, however, the majority in this Court distinguished the New York City Landmarks Law from discriminatory zoning by concluding that "the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city" (at 132), and adding in a footnote that "[W]e do not understand the New York Court of Appeals to disagree with our characterization of the law" (*id.*, n. 28).[13]

It is respectfully submitted that the *Penn Central* majority's distinction of landmarking from discriminatory zoning is untenable and should be abandoned. *First*: The New York Court of Appeals has shown, subsequent to *Penn Central*, that it indeed meant what it said in its *Penn Central* decision, namely that in landmarking there is no comprehensive plan or average reciprocity of advantage,[14] which the New York

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13 In dissent, Justice (now Chief Justice) Rehnquist also recognized the requirement for the "average reciprocity of advantage" (at 139-40), but, unlike the majority, he did not find there to be a comprehensive plan (*id.*).

14 "To be sure individual landmark designation involves greater problems than general zoning or historical district regulation, because unlike those types of restrictions the individual landmark designations do not involve corresponding restrictions of the surrounding parcels which operates [sic] to the benefit of the landmark owner (*Penn Cen-*

court continues to believe is unnecessary. The strained reading this Court's *Penn Central* majority put on what the New York court had written, in order to save its result, was simply wrong.

Second: In any event, the "comprehensive plan" which this Court's *Penn Central* majority (at 132) read into the New York ordinance (which was in fact never there) would not have withstood analysis had it indeed been in the ordinance. To analogize to zoning, a "plan" to zone a parcel here, a parcel there, and other parcels, if any, when one gets around to them, is nothing but piecemeal zoning.[15] Universally understood, along with "spot zoning" (see *infra*), to be the antithesis, not an example, of a comprehensive plan, piecemeal zoning is universally condemned. Specifically, it is as prohibited in New York (*Asian Americans for Equality* v. *Koch*, 72 N.Y.2d 121, 517 N.E.2d 265, 531 N.Y.S.2d 782 [1988]; *Freeman* v. *City of Yonkers*, 205 Misc. 947, 129 N.Y.S.2d 703 [Sup. Ct. Westchester Co. 1954]),[16] as it is elsewhere (*Cassel* v. *City of Baltimore*, 195 Md. 348, 73 A.2d 486 [1950]; *Little* v. *Board of County Commrs.*, 631 P.2d 1282 [Mont. 1981]; *Kozesnik* v. *Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 [1957]; *Higginbotham* v. *City of The Village*, 361 P.2d 191 [Okla. 1961]; *Palazzi* v. *State*, 113 R.I.

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tral Transp. Co. v. *City of New York*, 42 N.Y.2d 324, 330, aff'd 438 U.S. 104)." (*Society for Ethical Culture* v. *Spatt*, 51 N.Y.2d 449, 454, 415 N.E.2d 922, 434 N.Y.S.2d 932 [1980]). Significantly, the page citation to the New York Court of Appeals' *Penn Central* decision is to the very language upon whose meaning Justices Brennan and Rehnquist disagreed when that case reached this Court.

15 While sometimes used (also in a pejorative sense) as synonymous with "spot zoning", "piecemeal zoning" is usually more precisely defined as "when only part of the land within a municipality is regulated by the zoning law" (*Asian Americans for Equality* v. *Koch*, 72 N.Y.2d 121, 130, 527 N.E.2d 265, 531 N.Y.S.2d 782 [1988]).

16 "[I]t is clear that, as a general proposition, a local legislative body does not have the power to re-zone property along a main artery of travel, lot by lot at a time. Such would be piecemeal zoning, which is generally prohibited" (at 956).

218, 319 A.2d 658 [1974]; *City of Pharr* v. *Tippitt*, 616 S.W.2d 173 [Tex. 1981]; *Shelton* v. *City of Bellevue*, 73 Wash.2d 28, 435 P.2d 949 [1968]; *Bell* v. *City of Elkhorn*, 122 Wis.2d 558, 364 N.W.2d 144 [1985]).

While this Court has never had occasion expressly to hold that a comprehensive plan is a constitutional requirement (indeed, this Court has rarely considered zoning cases, thus leaving the development of jurisprudence in this field largely to the State courts), decisions of this Court have assumed the necessity of a plan. Thus, in *Penn Central*, Justice Brennan noted for the majority (at 133 n. 29) that

> "When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. See generally *Nectow* v. *Cambridge*, 277 U.S. 183 (1928)."

See also Justice (now Chief Justice) Rehnquist in dissent in *Penn Central* at 139-40; Justice Blackmun, concurring and dissenting in *Brendale* v. *Confederated Tribes*, 492 U.S. 408 at 458 (1989) ("the systematic and coordinated utilization of land that is the very essence of zoning authority"); and the discussion of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), in the concurrence by Justice Stevens in *Moore* v. *City of East Cleveland*, 431 U.S. 494 at 514-15 (1977).

State court decisions have made it indisputably clear that the rationale of the prohibition upon piecemeal zoning, and of the corresponding requirement of a comprehensive plan, is the necessity of keeping the restrictions of zoning within the police power, and of protecting against arbitrary and capricious discrimination by the zoning authorities. The requirement of a plan is thus grounded in the Constitutional protections of Due Process and Equal Protection (*see*, *e.g.*, *Asian Americans*, *supra*, 72 N.Y.2d at 131; *Kozesnik*, *supra*, 24 N.J. at 166).

It is therefore submitted that the constitutional underpinnings of landmarking, only briefly considered by this Court in *Penn Central* (and never before or since), bear further consideration. Certiorari ought therefore issue herein.

THE SPECIAL DEMOLITION PERMIT REQUIREMENT CONSTITUTES UNCONSTITUTIONAL REVERSE SPOT-ZONING

It is clear that the police power to enact or enforce zoning restrictions is not unlimited (*City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 [1985]). In particular, courts have routinely intervened and struck down zoning restrictions as not being a proper use of the police power in a class of cases, often referred to as "spot zoning" cases.

"Spot zoning" is commonly defined as the process of singling out a parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of the surrounding landowners (*Munger v. Town of Exeter*, 128 N.H. 196, 512 A.2d 418 [1986]; *Clark v. City of Boulder*, 146 Colo. 526, 362 P.2d 160 [1961]; *Salvetti v. Zoning Board of Adjustment*, 429 Pa. 330, 240 A.2d 534 [1968]). "Reverse spot zoning" occurs where a governing authority rezones a particular property in a certain deleterious manner, although the property in the adjoining area is zoned or rezoned in a different and more beneficial manner. *See Tollius v. City of Miami*, 96 So.2d 122 (Fla. 1957); *Jackson v. Wilson*, 195 So.2d 470 (Miss. 1966); *Odabesh v. Mayor and Council of the Borough of Dumont*, 65 N.J. 115, 319 A.2d 712 (1974); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587 (1976), 385 N.Y.S.2d 5, 350 N.E.2d 381, *app. dism. and cert den.*, 429 U.S. 990 (1976); *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954).

In the case at bar, the City, by virtue of the enactment of the Special Demolition Permit, has discriminatorily segre-

gated forty-four parcels and subjected them to special detrimental criteria that are not applicable to other parcels similarly situated, which, in contrast, were upzoned. A condition of the Special Demolition Permit ([81-742[c][2], App. 82a) means that a new structure replacing a Listed Theatre may be required to have substantially more floor space devoted to entertainment-related uses than a new structure on a neighboring non-Listed Theatre site, when the only distinction between the two sites is that they have had a different history of use. This is exactly what the controlling authorities condemn as unlawful reverse spot zoning.

Reverse spot zoning, as exemplified by the Special Demolition Permit requirement, is plainly and simply the unjustified and uncompensated frustration of private property rights for the ostensible benefit of the public. No matter how laudable the public goal may be, this discriminatory zoning mechanism is impermissible. This Court ought therefore grant a writ of certiorari to review the constitutionality of the Special Demolition Permit requirement.

CONCLUSION

This case presents substantial questions as to the proper application by State courts of *Penn Central* and other Takings Clause precedents to landmark designations, and invites explications by this Court of the Constitutional relation of the comprehensive plan, and its conceptual opposite, piecemeal or spot zoning, to land use regulation. The petition for a writ of certiorari ought therefore to be granted, and petitioners allowed to file their brief articulating at greater length and in greater depth why fundamental principles of constitutional law mandate a reversal herein.

Respectfully submitted,

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February 25, 1992

APPENDIX

Opinion of New York Supreme Court, Appellate Division, First Judicial Department, dated May 16, 1991

(Reported at 166 A.D.2d 115, 570 N.Y.S.2d 504)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

E. Leo Milonas, J.P.
Richard W. Wallach,
Sidney H. Asch,
Bentley Kassal,
George Bundy Smith, JJ.

THE SHUBERT ORGANIZATION, *et al.*,

Petitioners-Plaintiffs-Appellants,

For a Judgment Pursuant to CPLR Article 78 and a Declaration Pursuant to CPLR 2001,

—against—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents-Defendants-Respondents,

SAVE THE THEATRES, INC.,

Intervenor-Respondent-Defendant-Respondent.

ASCH, J

Petitioners, several theater owners as well as trade organizations, had sought, *inter alia*, in this declaratory relief and Article 78 proceeding, to annul the designation of twenty-two Broadway theatres as landmarks, and to declare null and void the underlying Landmarks Legislation and the anti-

demolition provision of the New York City Zoning Resolution.

Petitioners claim that the designation process in this case manifested an improper exercise in spot zoning, rather than a detailed analysis leading to the designation of a specific building or buildings as historic landmarks. The municipal respondents counter that the different, respective, decisions of the Landmarks Preservation Commission and the Board of Estimate, were based on exhaustive studies and reports, as well as public discussion on notice, and that the final vote of the Board of Estimate, although accomplished expeditiously, was not simply expediently arrived at and was supported by a rational basis.

The present challenge is both for a declaratory judgment, invoking the constitutional challenge, and on Article 78 grounds (*see generally*) Morris, *New York Practice Guide: Land Use Regulation* (Matthew Bender, 1988), Vol. 2, Sec. 17.05(3)(b)(vi)(A). The Landmarks Law seeks to protect those buildings, structures and landscape features which have a special character or have special historic or esthetic interest or value. The statutory vehicle for protection is either a designation as landmarks or their inclusion within historic districts. There is a distinction between the criteria for designation of an individual landmark or an interior landmark, on the one hand, and the criteria for designation of an historic district, on the other hand. (*Id.*, *at* Sec. 17.05(3)(b)(vii)(B), (C)).

In December of 1967, the Board of Estimate approved the City Planning Commission's proposal to create a special theatre district, to protect the district from the expansion of midtown construction. The Special District roughly approximated the Times Square area. The City Planning Commission sought to encourage the construction of new theatre space in newly constructed building by giving a bonus with respect to the utilization of space. The city as well as the State Office of Parks, Recreation and Historic Preservation, entered a memorandum of agreement with the federal government which required the city to begin consideration of landmark status for theatre buildings within the Broadway theatre district. The Landmarks Preservation Commission selected 35 theatres

for potential designation, which included the 22 theatres relevant to this appeal. The municipal authorities took heed of the public outcry following the demolition of the Helen Hayes and Morosco Theatres in 1982 and subsequently, the midtown zoning amendments to the Zoning Resolution targeted Broadway theatres to enhance their preservation. The zoning amendment continued the space use bonuses for construction of new theatres, and gave bonuses for the rehabilitation of specified theatres. Special permits for demolition were required as to 44 listed theatres.

The Landmarks Preservation Commission calendared public hearings to consider the designation of 45 Broadway theatres. These were scheduled in June of 1982, to allow preparation of reports on the historical, cultural, and architectural significance of the individual theatres. Respondents contend that the petitioners received individual notice and offered testimony. While not required as part of the process, Community Board 5 eventually voted in favor of landmark designation for all of the listed theatres. The record was kept open for additional comments and petitioners' architect submitted a report, analyzing the listed theatres. From April 21, 1984 through January 5, 1988, the Landmarks Preservation Commission held 29 public executive sessions for consideration of the subject designations. On August 6, 1985, the Commission designated exteriors and/or interiors of three theatres as landmarks.

In December of 1985, and March of 1987, respectively, the Landmarks Preservation Commission compiled two reports on preservation of the Broadway theatres and guide lines therefor. The record shows that the Landmarks Preservation Commission consistently received copious materials from numerous sources emphasizing the unique qualities, as set forth by the statutory criteria, relevant to each theatre. There is also evidence that at many of the executive sessions, a staff member would present the cultural, historical, architectural, and/or aesthetic value of each of the listed theatres. Further, a 35-to-40-page designation report was prepared for each building. Each theatre was then addressed, in alphabetical order, at public executive sessions commencing November 4,

1987. Respondents note that again petitioners were given notice and attended the meetings. Between November 4, 1987 and January 5, 1988, the Landmarks Commission designated the interior and exterior of nineteen of the listed theatres, the interior of 7 theatres, and the exterior of 2 more theatres. Thirteen theatres were not designated during this process. Of the 28 designated theatres, petitioners own 22; of the 13 non-designated theatres, petitioners own 10. Within five business days of each designation, the Landmarks Preservation Commission filed the designation reports with the Board of Estimate. After a public hearing, the Board of Estimate ratified the designations of all of the listed theatres in a single vote. Respondents note that this practice of a single vote on related matters has been the usual procedure of the Board of Estimate since 1950, and is the norm for approving or disapproving landmark designations.

After the Board of Estimate approved these matters, in October of 1987, the Landmarks Preservation Commission issued 47 landmark designations for 28 theatres, in alphabetical order, which gave rise to the present action. (Some theatres are landmarked as to interior as well as exterior).

Petitioners assert that the landmark designations, both interior and exterior, have had detrimental effects on the owners' ability to adapt theatres to changing productions and changing times. They also submit there is a cost factor borne by the owners, in keeping up the theatres, and by producers who use the landmarked theatres.

Further, petitioners attack the voting procedure of the Board of Estimate when, in approving these designations, it exercised a single roll-call vote. Petitioners argue that these are separate structures with no common architectural style and thus the single roll-call vote underscores their contention that the purpose was to preserve the theatre industry by means of sham designations. Petitioners note the boilerplate introduction to the description and analysis in each report for each theatre, as bearing untoward uniformity. Petitioners also emphasize their contention that this was protection of an industry, rather than of individual buildings, by noting that those theatres within the theatre subdistrict which were not

landmarked were not currently in use as legitimate theatres, or otherwise were protected from demolition. Further, petitioners argue that the aesthetic, cultural, and architectural attributes of the landmarked, and the nonlandmarked theatres are essentially indistinguishable.

Petitioners then challenge the procedure in Supreme Court where the court refused to hold an evidentiary hearing. The hearing, characterized as evidentiary, would have inquired into whether the Board of Estimate followed routine procedure in having a single roll-call vote. However, on appeal, petitioners argue that an evidentiary hearing would have inquired into whether evidence existed that the City was seeking to regulate the theatre industry as a whole, in violation of the mandates of the various agencies.

This court is circumscribed by the scope of judicial review of administrative determinations. It is well established that the court may not substitute its judgment for that of the administrative body (*see generally*, with respect to landmarks, *Matter of Society for Ethical Culture* v. *Spatt*, 68 A.D.2d 112 (1st Dept. 1979), *aff'd*, 51 N.Y.2d 449). This Court has already noted the particular expertise of the members of the Landmarks Preservation Commission *supra*, at 117; accord, *Matter of Committee to Save the Beacon Theatre* v. *City of New York*, 146 A.D.2d 397, 405 [1st Dept. 1989]). Considering the wealth of analyses and reports, as well as anecdotal testimony, provided to the Landmarks Preservation Commission prior to the subject designations, it appears to be beyond serious challenge that a reasonable basis existed for the designations as to each theatre, upon a consideration of the statutory criteria.

There is no basis to argue that the proposals were "railroaded" through the Landmarks Preservation Commission; the preliminary analyses and reports were exhaustive, the decision making occurred over the course of several years. Three days of public hearings simply concluded the input into the decision making, and the final decisions do not appear to have been arrived at with any great dispatch. While petitioners complain of the limited time allowed to them for comments before the Board of Estimate, there is no indication

that they were deprived of a meaningful opportunity to submit their own reports or comments prior to the Board of Estimate hearing, particularly at the Landmarks Preservation Commission phase of proceedings.

Further, there is criticism by petitioners of the single roll call vote by the Board of Estimate. But, the Board had received individual reports, as well as the Planning Commission reports, prior to the Board of Estimate hearing. Finally, in this regard, we note, as mentioned above, that since the 1950's the Board had routinely entertained a single vote on similar matters, particularly those involving zoning and landmark designations.

Manipulation of the Landmarks Law by the Landmarks Commission only for the purpose of preserving the Broadway theatre industry, rather than individual theatres, would have been improper (*see* Landmarks Law [Admin. Code] § 25-304 subd. a). Such a practice would misconstrue zoning matters for landmark matters. However, notwithstanding the district within which the theatres stand, the designation proceedings addressed the exteriors and/or interiors of the specific buildings in terms of the criteria of the Landmarks Law. (*See generally Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 133; *affg.* 42 N.Y.2d 324, 329-330). Municipal respondents point out that the Landmarks Preservation Commission has designated theatres which are located outside of the Broadway District, such as the Apollo, the Beacon, City Center, Carnegie Hall, and Town Hall, on the basis of the same statutory criteria. This is further evidence that the Landmarks Commission was not seeking to protect the Broadway theatre industry by sham designations.

Accordingly, we agree with the nisi prius court that the administrative determination was based on substantive evidence, was not arbitrary and capricious and did not violate the law.

With respect to the constitutional challenge, the *Penn Central* case, *supra*, established the constitutionality of the Landmarks Law. Petitioner's challenge, that *Penn Central* is not controlling since it did not address the method of designation is without merit. *Penn Central* involved the alteration of a

landmark, a restriction which arises out of the designation. Since the Supreme Court in *Penn Central* (*supra*, 438 U.S. at 138) clearly ruled that the application of the Landmarks Law does not affect a taking of the property, the constitutional challenge thereby is resolved. Further, under the standards set forth in *Spears* v. *Berle* (48 N.Y.2d 254, 263) and *Honore de St. Aubin* v. *Flacke* (68 N.Y.2d 66, 76), the petitioners have not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres denies them essential use of their property.

Finally, with respect to the constitutional argument, the scheme of law embodied in the Landmarks Act serves a legitimate purpose of saving historical landmarks (*see Seawall Associates* v. *City of New York*, 74 N.Y.2d 92, 112, *cert. den.* ____ U.S. ____, 110 S. Ct. 500 [1989]). With respect to any claim that petitioners are deprived of any economic use of their property, in the absence of final agency action on applications by petitioners for renovations or alterations, the matter is not ripe for review (*Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510 *at* 520; *see* permit provisions for alternations or demolitions in Landmarks Law [Admin. Code] §§ 25-306, 25-307). In the meantime, there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres (accord, *Penn Central*, *supra*, at 136). In any event, transferable development rights inure to the owners of these buildings, which, absent a successful challenge, must be presumed to have economic benefit. We note that some of petitioners, in fact, have made use of these transferable developmental rights.

Petitioners also challenge the provision of the Zoning Resolution (Zoning Resolution § 81-742) which requires listed theatres to obtain a special permit from the City Planning Commission for demolition. This, of course, is a zoning matter, rather than a landmark matter. Petitioner bears the heavy burden of demonstrating the unconstitutionality of the zoning ordinance (*Robert E. Kurzius, Inc.* v. *Incorporated Vil. of Upper Brookville*, 51 N.Y.2d 338, 344) and discriminatory effects of a statute will not render the statute invalid

if there exists a reasonable basis (*Lighthouse Shores* v. *Town of Islip*, 41 N.Y.2d 7, 12). There is no evidence that this provision is not based on a comprehensive plan and, as municipal defendants point out, similar demolition permits are required by the Zoning Resolution in several other special districts.

Finally, considering the narrow scope of review available to the court below, it cannot be said that with the volumes of documentary evidence in the record and supporting affidavits, that there was a need to conduct an evidentiary hearing to examine whether the Board of Estimate's voting mechanism was arbitrary and capricious, or in violation of law. Since the court was not empowered to substitute its own judgment for that of the administrative body, the only inquiry was whether the record, as submitted, supported the voting procedure and the determination. We agree that it did.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Irma Vidal Santaella, J.), entered February 6, 1990, which denied petitioners' motion for summary judgment, granted summary judgment to municipal respondents, and dismissed the petition and complaint, should be affirmed, without costs or disbursements.

All concur.

Opinion of New York Supreme Court, New York County dated December 5, 1989 (Unreported)

SUPREME COURT: NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 35

Index No. 12587/88

IN RE: SHUBERT ORGANIZATION, INC., *et al.*,

Petitioners,

—against—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

HON. IRMA VIDAL SANTAELLA

Petitioners bring this combined action and proceeding, pursuant to Articles 30 and 78 of the CPLR, for a judgment 1) declaring void and vacating each landmark designation of twenty-two individual theatre buildings, 2) declaring invalid the Special Demolition Permit requirement, 3) declaring the Landmarks Preservation Law ("Landmarks Law") void and 4) remanding the matter of theatre preservation to respondents for further consideration.

Petitioners, other than The League of American Theatres and Producers, Inc. (a trade association representing the interests of theatre owners and producers), own one or more of the theatres in issue:

Theatre	*Address*
Barrymore	243-251 W. 47th Street, N.Y., N.Y.
Martin Beck	302-314 W. 45th Street, N.Y., N.Y.
Belasco	111 W. 44th Street, N.Y., N.Y.
Booth	222-232 W. 45th Street, N.Y., N.Y.

Theatre	*Address* (Cont.)
Brook Atkinson	256-262 W. 47th Street, N.Y., N.Y.
Broadhurst	235-243 W. 44th Street, N.Y., N.Y.
Cort	138-146 W. 48th Street, N.Y., N.Y.
Forty Sixth Street	226-236 W. 46th Street, N.Y., N.Y.
Golden	252-256 W. 45th Street, N.Y., N.Y.
Mark Hellinger	217-239 W. 51st Street, N.Y., N.Y.
Imperial	249 W. 45th Street, N.Y., N.Y.
Longacre	220 W. 48th Street, N.Y., N.Y.
Lunt-Fontanne	203-217 W. 46th Street, N.Y., N.Y.
Lyceum	149-157 W. 45th Street, N.Y., N.Y.
Majestic	245-257 W. 44th Street, N.Y., N.Y.
Music Box	239-247 W. 57th Street, N.Y., N.Y.
Eugene O'Neill	230-238 W. 49th Street, N.Y., N.Y.
Plymouth	236 W. 45th Street, N.Y., N.Y.
Royale	242-250 W. 45th Street, N.Y., N.Y.
St. James	246-256 W. 44th Street, N.Y., N.Y.
Shubert	221-233 W. 44th Street, N.Y., N.Y.
Winter Garden	1634-1646 Broadway, N.Y., N.Y.

Respondents are the Landmarks Preservation Commission ("LPC"), the City Planning Commission ("CPC"), the Board of Estimate ("BOE") and the City of New York.

Save the Theatres, Inc., Actors' Equity Association, Society of Stage Directors and Choreographers, United Scenic Artists Local 829, Dramatist Guild, National Trust for Historic Preservation in the United States, New York Landmarks Conservancy, Inc., Municipal Arts Society and the National Center for Preservation Law have intervened as *amici curiae* urging dismissal.

The petition and complaint, as amended (the "petition") sets forth eleven causes of action. The first cause alleges the BOE and LPC exceeded their powers under the Landmarks Law (New York City Administrative Code Title 25 Chapter 3) and the landmark designations were arbitrary, capricious, an abuse of discretion and illegal as unauthorized under the New York City Charter, the Landmarks Law and its enabling legislation, General Municipal Law ("GML") Article 5 Section 96-A.

The second cause alleges BOE violated the Landmarks Law, GML 96-A, general principles of due process and administrative law and its own practices regarding designations of landmarks and were arbitrary, capricious, an abuse of discretion and illegal in that BOE failed to consider each individual building on its own merits and in voting by means of a single roll call vote to approve LPC's designation of twenty-eight individual theatre buildings on March 10, 1988.

The third cause alleges the LPC and/or the BOE violated the Landmarks Law, GML 96-A, general principles of due process and administrative law by failing to have a transcript of the public hearings held in 1982 at the time when LPC designated the buildings as landmarks and/or when the BOE voted to approve the designations.

As a fourth cause, petitioners allege the designations insofar as they included theatre interiors constituted unreasonable governmental interference with the essential need for prompt and cost-efficient accommodation of interior facilities to the varying and distinct needs of changing theatre productions and were arbitrary, capricious and an abuse of discretion.

As a fifth cause, petitioners allege respondents' failure to determine the environmental significance of the designations was arbitrary, capricious, an abuse of discretion and illegal rendering the designations void since under the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law Article 8 ["ECL"]), the designations are "actions" which may have a significant effect on the environment in New York City.

The sixth cause alleges the landmarks law is unconstitutional on its face insofar as its exemption for properties not making a reasonable return is insufficient and unreasonable because its hardship provision [25-309) is inadequate.

The seventh, eighth and ninth causes allege the listed theatres which have not been landmarked are subject to the Special Demolition Permit requirement which is ultra vires and void as New York City Zoning Resolution 81-742 ("ZR") is beyond the powers vested in the CPC; is illegal and unconstitutional on its face as it places a disproportionate burden of preserving the theatre industry solely upon the owners of

property with theatres rather than upon all property owners in Midtown Theatre Subdistricts and fails to provide a hardship exemption.

The tenth cause alleges the designations constitute a "taking" of property without just compensation in violation of petitioners' substantive and procedural due process and equal protection rights under the state and federal constitutions.

The eleventh cause alleges damages, to be proved at trial, of not less than $200,000,000.

Respondents have served their amended answers and have interposed a combined total of fifteen affirmative defenses requesting dismissal of the petition and complaint.

In their first defense, respondents LPC, BOE and the City of New York allege the LPC's determination to designate each of the subject theatres was reasonable, is not arbitrary and capricious as it is fully supported by the record submitted herein; the second, the LPC's determination to designate each of the subject theatres was made on an individual basis, not in a wholesale fashion as each theatre was designated on its own individual merit and not as an industry; the third, the landmark designations were effectuated by LPC and approved by the BOE in accordance with applicable Due Process standards and that petitioners were given notice and opportunity to be heard at every stage of the designation process; the fourth, LPC's adoption of Guidelines for the Treatment of Designated Broadway Theatre Exteriors and Interiors is a valid exercise of LPC's regulatory power to assist in the preservation of landmarks; the fifth, the subject landmark designations are not subject to the State Environmental Quality Review Act (SEQRA) and City Environmental Quality Review (CEQR) and that the designation process is exempt from these environmental provisions because the designation of a building as a landmark is not an "action" within SEQRA and CEQR; the sixth, petitioners have no standing to raise environmental claims because they only raise claims of economic damage in the petition.

In the seventh, respondents contend that the hardship provision of the Landmarks Law (Section 25-309) is constitutional and valid, and in the eighth and ninth, respondents

allege that petitioners' challenge to the constitutionality of the hardship provision and landmark designations is premature as no hardship application has been filed. Neither has any application for any permit of demolition or certificate of alteration been made by petitioners.

In the tenth, respondents allege petitioners' claim of an unconstitutional taking of their properties without just compensation by virtue of landmark designations is premature as they have not yet suffered a specific hardship or availed themselves of statutory methods to be relieved of any such alleged hardship. In the eleventh, LPC, BOE and the City allege petitioners have not been hindered in the continued use of their properties as theatres and therefore, the designations of the subject theatres as landmarks does not constitute an unconstitutional taking.

Respondent CPC interposes four affirmative defenses in its amended answer:

In the first, CPC alleges the Special Demolition Permit ("SDP") (ZR Section 81-742) is not ultra vires; the second, that SDP is constitutional and lawful in all respects; the third, that review of the SDP is premature; and the fourth, that all respondents have worked in accordance with a comprehensive zoning plan to preserve the character of the Theatre District.

By notice of motion, dated December 5, 1988, petitioners have moved for summary judgment (CPLR 3212) granting the relief sought in their petition. By notice of cross-motion, dated December 6, 1988, respondents have moved to dismiss the petition (CPLR 7804(f)) and the complaint (CPLR 3211) or for summary judgment (CPLR 3212).

It is noted that while these motions were noticed prior to service of the amended pleadings, the essential allegations and defenses remain substantially the same. The need for the amendment was recognized by the parties and the Court when respondents first learned that the stenographer's notes of the public hearing held in 1982 before the LPC had not been destroyed (as originally thought) but were located and made available for transcription. The transcript is now made part of this record. The pleadings, as amended, include two

new claims and related defenses. The first claim, relates to the absence of the transcript before the LPC and the BOE. The second relates to the BOE's method of voting on the landmark designations.

Now, the motion and cross-motion are considered together with oral arguments by all parties made before the Court prior to and at the time of final submission on June 15, 1989. Additional submissions were received as late as August 2, 1989.

In their amended petition and complaint, verified May 1989, petitioners allege:

> "The City of New York engaged in an ill-conceived and shortsighted effort to preserve the Broadway theatre industry, has taken drastic and illegal action to prevent the demolition or alteration of buildings currently housing legitimate theatre. The Landmarks Preservation Commission, proceeding in alphabetical order by theatre name, has designated as a landmark virtually every building located in the Broadway Theatre District currently in use as a legitimate theatre. In parallel fashion, the City Planning Commission has created a list of legitimate theatres and prohibited their demolition by enacting discriminatory demolition requirements should landmark restrictions not apply.
>
> The City's actions threaten to stultify rather than revitalize legitimate theatre in the Broadway Theatre District. The restrictions were imposed without a proper plan in utter disregard of the economic realities of the Broadway theatre industry. The theatre owners and producers—whose continued economic vitality is central to the health of Broadway theatre—have been precluded from sharing in the economic growth of the west side of Midtown, and have had the greater part of the value of their theatre properties taken from them. Additionally, the landmarks restrictions prevent the owners and producers from incorporating state-of-the art technologies in their theatres, and adapting their theatres to the scenic and structural demands of various productions,

unless the interiors are restored to their previous condition at enormous costs.

The restrictions the City had adopted to achieve its goals are plainly unauthorized by the state legislation establishing the City's powers to enact landmark and zoning restrictions. The wholesale landmark designations were made as part of a pre-conceived plan to landmark the theatre industry, without a good faith individual assessment of the aesthetic, historic and cultural merit of each structure. By imposing discriminatory and onerous burdens on the theatre owners, the City has violated fundamental notions of fairness, Due Process, and Equal Protection under the Federal and State Constitutions. Further, the City's actions were taken in complete derogation of the provisions of state law requiring governmental officials to determine whether their actions may have a significant impact on the physical environment, which includes existing patterns of neighborhood growth and development and community character.

While petitioners, who own and operate the theatre properties in issue, have not sought to demolish a theatre in twenty years and have no present intent to do so, the City's illegal actions should nonetheless be annulled, and the City should be required to re-think and re-examine its approach to preserving the Broadway theatre industry consistent with government principles of law."

Respondents' position is petitioners' claims are not ripe for review, the landmark designations and zoning resolution are proper, the environmental laws do not apply, there have been no due process or equal protection violations and there has been no unconstitutional "taking" of property.

The voluminous record herein includes the following excerpt which compromises a comprehensive history of Broadway theatre:

"The theatre industry is crucial to the cultural and financial life of the city. Tourism is New York's number one nonmanufacturing industry. In 1986, seventeen mil-

lion visitors brought $2.5 billion dollars into the city and tax revenues of $265 million. Of these visitors, nearly half came to the city primarily for cultural purposes. And it is the Broadway theatre that holds first place on the list of cultural attractions. Seeing a Broadway show is the single most important reason why tourists visit New York City. The Broadway theatre outdraws all other cultural and sporting events. Over seven million Broadway theatre tickets were sold in 1986-87 season. Thirty-seven thousand persons are employed as actors, stage hands, technicians, writers, etc. The area around Times Square provides support services to the theatre industry—shops, restaurants, hotels, customers, rehearsal halls, music and taxis.

The Broadway Theatre District is the largest and most famous concentration of legitimate stage theatres in the world. The Broadway theatre shares an important role in the development of theatre within the City of New York and dramatic arts in America. The Broadway Theatres were constructed during the first thirty years of this century, a time when the Theatre industry within New York City was undergoing a fertile period of rebirth. At the turn of the century, the Theatre business moved into what was then known as "Long Acre Square", now known as Times Square. Having moved gradually northward all during the 19th century, New York's theatre district finally came to rest at Time Square, where it has remained for almost ninety years.

All of the subject theatres were built between 1901 and 1927, years when the City experienced its single most fertile period of theatre construction. This burgeoning growth of the theatre Industry in the Times Square area coincided with a number of developments which coalesced to heighten the importance of that area as a major hub of the City. That steady evolution of the City's transportation system, ever focused on the Times Square area, made that a prime location of Theatre entertainment.

In addition, at the turn of the century, the method of presenting a play was undergoing a fundamental change. The "stock system" whereby actors worked in one theatre for a season in a variety of plays was replaced by the "combination system" under which a company of actors appearing in a single show would tour from city to city. Important to the viability of the combination system was a single location to cast, rehearse and develop a show for a cross-country tour. New York became the headquarters for the combination system.

The construction of the Broadway Theatres, was an important development in the City's cultural history as a center for theatre entertainment. In addition, this ongoing period of theatre building witnesses an evolution of theatre design and architecture. The increase of theatre construction after the turn of the century gave rise to a new attitude in design from the 19th century style to the 20th century style of fan-shaped seating, fewer balconies and a lower and wider proscenium. Seventy-two theatres were constructed in New York City shortly before and shortly after World War I. From the time of the depression until the 1960's no new playhouses were constructed.

Because the subject theatres were built at a time when New York was the springboard for theatre performance and architecture, these theatres set the tone for theatre construction throughout the country, because productions launched in New York required similar accommodation in other cities. Thus, the subject theatres participated in and by their very existence demonstrate the rich cultural and historical heritage of the City of New York and of the nation.

The playhouses still standing in the Broadway Theatre District share among them over eighty years of American theatrical history. It was in the Broadway Theatres that the beginning of a distinctly American drama could be seen. On Broadway in the 1920's the work of a new generation of playwrights was seen—Eugene O'Neill,

> Maxwell Anderson, George S. Kaufman, and others. In the 1930's the Broadway theatre produced work of political and social concern written by Lillian Hellman, Robert Sherwood, and Thornton Wilder. In the 1940's and 50's Tennessee Williams, Arthur Miller and William Inge wrote for the Broadway stage. Meanwhile, musical comedy had blossomed into a uniquely American art form, producing the works of Rogers and Hammerstein, Cole Porter, Irving Berlin, Jerome Kern and many others.

A factual background is as follows:

In 1967, the BOE approved CPC's proposal to establish the Special Theatre District in response to a threat to the theatre industry posed by the expansion westward of Midtown office construction. This was the first of many Special Districts in the City. Developers were induced to include legitimate theatres in new office buildings by granting the Highest Floor Area Ratio ("FAR") allowed. Since 1967, five new theatres have been building in the Special Theatre District.

In the mid 1970's a proposal by the City to revitalize Time Square included building a major hotel at Broadway and 45th Street. The project then known as the Portman Hotel (now the Marriott-Marquis Hotel) was subject to the National Historic Preservation Act of 1966 (16 U.S.C. 470(f)), as amended 90 Stat. 320 (the "Act") because financing was to be supplied, in part, by the federal government. The Helen Hayes and Morosco theatres occupied the Portman Hotel site. Under the Act, the City had to determine if these theatres were eligible for inclusion in the National Register of Historic Places. The Helen Hayes Theatre was found eligible and the City was required to find ways to mitigate adverse effects of the proposed demolition.

In 1978, the LPC began a preliminary study of the west side of Midtown Manhattan, including the Broadway Theatre District, to identify buildings potentially worthy of landmark status. Initially, LPC listed thirty-five theatres ("listed theatres") for further consideration.

In 1979, an agreement was entered between the Federal Advisory Council on Historic Preservation and the City in conjunction with the New York State Office of Parks, Recreation and Historic Preservation to take "reasonable and appropriate measures to locate, identify and preserve significant buildings" in New York City. The agreement provided "where appropriate, the process of landmarking . . . will be initiated." Also in 1979, CPC considered rezoning in midtown Manhattan to encourage more real estate development on the west side by increasing the allowable bulk of new buildings.

In March 1982, the Helen Hayes and Morosco Theatres were razed in the midst of public demonstrations which led to an outpouring of public concern by the citizenry at large for the safety of other theatres. On May 13, 1982, Midtown zoning amendments to the Zoning Resolution were passed. The amendments included special provisions relating to Broadway theatres—the Special Regulations for Theatre Subdistrict. (ZR 81-70). The purpose of the regulations was "to preserve and protect the character of the theatre subdistrict as a cultural and theatrical showcase." (ZR 81-71). Floor Area Ratio ("FAR") bonuses were also given for rehabilitation of certain listed theatres. (ZR 81-745). Other provisions were utilized to help preserve the character of the area as an entertainment center. (ZR 81-721, 722 and 723). LPC added nine more theatres to the original list of thirty-five for a total of 44 listed theatres. To demolish a listed theatre, the owner was required to meet certain criteria and obtain a Special Demolition Permit from CPC. (ZR 81-742). Transfer of unused Development Rights (air rights above existing buildings) is regulated by the Zoning Resolution. The 1982 Zoning Resolution amendments included a provision which benefited listed theatres only. If certain conditions are met, transferable development rights ("TDR" 's) may be used in a manner not otherwise permitted. To qualify for this benefit, the theatre owner must agree to the continued use of the building as a legitimate theatre. (ZR 81-743). Four theatres have already benefited from the transfer of their TDR's under ZR 81-743. The four theatres, The Belasco, The Lyceum, The Palace and

The Ritz, are all owned by petitioners. Owners of landmark buildings are given benefits not available to owners of non-landmark buildings. (See ZR 74-79, 711 and 712). Certain additional benefits are given to owners of theatre buildings designated as landmarks. (See ZR 81-747, 747(a), 747(b)).

With respect to the issues at hand, the record shows that on April 12, 1982, LPC voted to calendar the listed theatres for a public hearing to consider landmark designations. The owners of all listed theatres received notice. The hearings were held on June 14 and 15, 1982. At the request of petitioners and Community Board No. 5, the public hearing was continued on October 19, 1982 so petitioners could submit their reports on the historical, cultural and architectural significance of each building under consideration. (Petitioners subsequently commissioned a second report which was submitted to LPC.) Prior to and during the course of hearings LPC received numerous letters from members of the theatre industry, local and national figures, politicians and the general public in support of designation. Approximately 80 people testified on behalf of themselves or membership organizations. Reports on the architectural, historical, cultural and aesthetic importance of the theatres were submitted to LPC by a number of groups. Petitioners received advance notice of the hearings to be held and appeared and participated fully. Petitioners commissioned and submitted reports for consideration by LPC.

The ZR required the Mayor of the City of New York to appoint a Theatre Advisory Council ("TAC") including a chairperson, and representatives of the performing arts, the theatrical industry and related professions to advise the CPC concerning applications for special permits or certifications pursuant to ZR 81-74. TAC was appointed and met 40 times from July 1982 to May 1984. TAC had 15 members including theatre owners, representatives of the community and of theatre unions, a theatre historian, a real estate developer, architects and lawyers. In June 1984, the Theatre Advisory Council issued its report titled "To Preserve The Broadway Theatre." The report unabashedly stated its goal was the preservation of all 44 (now 45) listed theatres for legitimate

theatre use. The report made a number of recommendations regarding interior landmark designations, permanency of the prohibition against demolition of any listed theatre, zoning changes, encouragement of theatre-related uses and covenants for preservation of theatres, and the use of bonuses. CPC adopted these recommendations in a three phase comprehensive plan. Other recommendations regarding certain real estate tax relief and creation of a theatre trust have not been adopted by CPC but implementation has been proposed by the Mayor's Office. The proposed Theatre Trust would be a not-for-profit organization with a board of professional people and experts in the theatre industry. The Trust would lease and operate a number of theatres including those owned by petitioners. The owners would be relieved of the cost of maintaining these theatres. A production company would be established to develop and produce new dramatic plays, to assist playwrights and reduce the costs of tickets for the public. The proposed tax relief would apply to listed theatres not used one-third or more of the year and would reduce property tax within a range from about $160,000 to $525,000.

After the public hearings were concluded the LPC held 29 public executive sessions for further consideration and review of each theatre for possible designation. These sessions began on April 12, 1984 and concluded on January 5, 1988.

In August 1985 LPC voted to designate three theatres as landmarks. These designations were submitted to the BOE for final consideration. The BOE asked that LPC make its decisions on all listed theatres and present them to BOE at the same time rather than individually.

On March 10, 1988, the BOE held a public hearing on LPC's designations. After the public hearing in which petitioners participated, the BOE approved LPC's designations.

The Landmarks Law (New York City Administrative Code 25-301 et. seq.) was enacted to protect historic buildings and neighborhoods from precipitous decisions to destroy or change their character.

"§ 25-301 PURPOSE AND DECLARATION OF PUBLIC POLICY

A. The Council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplacable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

B. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest of value is a public necessity and is required in the interests of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic

pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

A landmark is defined as:

> "Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development heritage or cultural characteristics of the City, State or Nation, and which has been designated as a landmark pursuant to the provisions of this chapter." [25-302(n)].

The New York City Charter Section 534 established the LPC to include eleven members with at least three architects, one qualified historian, one city planner or landscape architect and one realtor. The LPC is responsible for carrying out the provisions of the Landmarks Law. The LPC has the power, after a public hearing, to designate a landmark, landmark sites, interior landmarks, scenic landmarks and historic districts. (Landmarks Law 25-303). Notice of public hearings are to be given as provided in Landmarks Law Section 25-313. After any such designation the LPC must file a copy of its designating report with the BPE, CPC and other city agencies. (Landmarks Law 25303(4)(f)). The BPE may notify or disapprove such designation. (Landmarks Law 25-303(4)(g)(2)).

After the BOE acts, the owner may seek judicial review of any final designation decision. Owners of landmarks must keep them "in good repair" (Landmarks Law 25-311) and seek approval from the LPC for proposed alterations or improvements (Landmarks Law 25-305).

The issues presented on judicial review are whether respondents proceeded in excess of jurisdiction, whether respon-

dents' determinations were made in violation of lawful procedure, were affected by an error of law or were arbitrary and capricious or an abuse of discretion and whether any of petitioners' constitutional rights have been violated. Upon careful examination of the entire record, the Court finds the amended petition and complaint lacking in merit and grants respondents' cross-motion in its entirety. Thus, petitioners' motion must be denied as moot. Petitioners' rather conclusory assertions that respondents' actions were, *inter alia*, "ill conceived", "shortsighted", "drastic and illegal", "plainly unauthorized" and "onerous" are in sharp contrast with the contents of the record.

As a threshold matter, the petitioners' claims are ripe for review because the petitioners' papers present facial attacks on various provisions of the Landmarks Preservation Law and the amendments to the New York City Zoning Resolution.

Addressing the eleven causes of action seriatim: Petitioners have not met their burden of proof on the first cause of action by showing the landmark designations were arbitrary or capricious or had no rational basis. Judicial review is limited to whether there is a rational basis for the determination in issue. (*Matter of Pell* v. *Board of Education*, 34 N.Y.2d 222; *Society for Ethical Culture in the City of New York* v. *Spatt*, 68 A.D.2d 112, *aff'd*, 51 N.Y.2d 449). The Court's function is complete once a reasonable basis in fact is found in the entire record. (*300 Gramatan Avenue Assoc.* v. *Div. of Human Rights*, 45 N.Y.2d 176). A reviewing Court may annul a discretionary determination of an administrative body only if the determination is illegal, arbitrary or capricious. (*Corliss* v. *Solomon*, 75 A.D.2d 837). The court may not substitute its own findings or judgment for that of the agency. (*See Newbrand* v. *City of Yonkers*, 285 N.Y. 164; *Zeidler* v. *Board of Supervisors of Suffolk Co.*, 35 A.D.2d 54). The court need not agree with the agency as long as there is factual support in the record for the agency's determination. *Matter of Phinn* v. *Kross*, 8 A.D.2d 132).

Here, the record (over 7,000 pages) is replete with testimonial, photographic and documentary evidence attesting to the

special architectural, aesthetic, historical and cultural value in the designated aspects of each landmarked theatre. Petitioners allege "The landmark designations were made pursuant to a predetermined policy to landmark each and every legitimate theatre in Midtown which had any potential for development, without regard to the applicable standards under the Landmarks Law." While it is true the Theatre Advisory Council desired to preserve all listed theatres, there is no probative evidence that was the goal of any agency named as a respondent herein. To the contrary, the record shows each theatre building was given individual consideration of its unique features and history thought to merit protection. Not all theatres were found to permit protection and on some, only interior or exterior features were found to be of such special character or special historical or aesthetic interest or value as to warrant protection. The rest were rejected. Notwithstanding, the goals and recommendations of the Theatre Advisory Counsel, petitioners' blanket claims are unsupported.

Moreover, there is no support for petitioners' claim that respondents have exceeded their statutory authority. The record provides support for finding each building was designated on its own merits not *en masse* as claimed. If there were evidence that respondents sought to control the theatre industry as a whole, clearly the agencies would have violated their mandates.

In the second cause of action, petitioners allege various violations by the BOE. Again, however, the record does not support the claims. As noted, the record again supports a finding each building was considered separately on its own interior and exterior features. Petitioners complain the buildings were simply listed alphabetically and considered as a group. Obviously, the theatres were listed alphabetically to avoid confusion and as an aid to a more efficient and logical review.

The single roll call vote procedure by the BOE appears to have been a matter of administrative discretion and convenience. The BOE was entitled to vote on the designations as a group providing there is no prejudice to petitioners. Petitioners have not shown any prejudice or violation of any law or

rule concerning the voting methods at BOE. There is no requirement that individual votes be taken on each matter before the BOE. Petitioners have not produced any support for the allegation that their rights were violated. Respondents show by example how a single vote is a simple expedient in the face of busy calendars.

The third cause of action relating to the absence of the transcript is without merit. While the public hearings before the LPC were mandated by law, there is no statutory requirement that testimony at the hearings be transcribed. The stenographer's notes were made in case a private party or reviewing party or court required a transcript of the hearings. Members of each commission or the BOE could have requested transcripts but instead chose to consider and rely on other evidence and reports made available and provided to them. There is no statutory provision specifying exactly what evidence must be considered by each agency except Landmarks Law 25-303(4)(f) which provides only that the LPC shall file a copy of its designating report with each agency involved.

Petitioners' interests and concerns were presented at every stage of the proceedings by their chosen representatives. Petitioners should not be heard to complain that the process took as long as it did or that members of the commissions have changed over time. Petitioners themselves were, in great part, responsible for the length of the proceedings. The record shows petitioners requested continuations and adjournments so that they might have additional time to prepare reports or present evidence. Further, there is nothing in any statute that requires members of LPC, CPC, or BOE to remain the same throughout the course of proceedings. If such were the same, no agency could act effectively as membership tends to change for personal and professional reasons. It is, however, each individuals' responsibility as a member of a commission to educate and inform himself or herself on the details of the business before them so they make informed decisions. Members of each commission had numerous reports and other evidence before them before they voted. Just because certain members did not attend the public hearing is not enough to

invalidate the work of the commission provided there was a quorum.

Petitioners challenge the interior designations in their fourth cause of action as arbitrary, capricious, an abuse of discretion and illegal. The Landmarks Law specifically authorizes the LPC to designate interior architectural features as landmarks. Petitioners argue the interior designations are counterproductive to preservation and constitute an unreasonable interference with theatre productions. Petitioners' experts with eminent credentials in the field of theatre and stage design, express their opinions that the interior designations and regulations are incompatible with the requirements of good and efficient theatre and stage design. Respondents' experts, equally well-qualified in their field, express their view that interior landmarks and regulations are compatible with good theatre and stage design. Respondents cite the theatre production of "Cats", "Starlight Express" and "Phantom of the Opera" as examples of how old theatres may be modified under the interior guidelines to accommodate the latest advances in theatre/stage design requirements. Even if this Court were to agree with petitioners' experts, this Court may not substitute its judgment for that of the reviewing agency absent a finding of arbitrariness or capriciousness or the agency's action was in violation of lawful procedures or made in excess of jurisdiction. (*Carroll* v. *Ortiz*, 122 Misc. 2d 164 and *Minerva* v. *Ward*, 101 A.D.2d 754, *aff'd*, 63 N.Y.2d 739). Here, review of the record reveals a rational basis for the respondents' determination to landmark certain theatre interiors. As with the exterior designations, the record reveals each interior designation was considered individually on its own merits.

The Guidelines for the Treatment of Designated Broadway Theatres Exteriors and Interiors adopted by LPC after a number of public executive sessions was a valid exercise of its regulatory power to assist in the preservation of landmarks. The Guidelines were the result of years of study and discussion involving various experts familiar with theatrical requirements. Theatre owners were involved. The Theatre Advisory Council which also included theatre owners, recommended

the Guidelines and that the designations not be approved until the Guidelines were in place. Certain petitioners testified for the Guidelines which provide a simplified procedure and time limits for processing applications to do certain kinds of work. There is nothing arbitrary, abusive or illegal in the Guidelines.

The the fifth cause of action regarding SEQRA is without merit. The Environmental Conservation Law 8-0109(2) ("ECL") provides, in relevant part, "all agencies . . . shall prepare . . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment."

To argue as petitioners do, the designation of one or more buildings as landmarks constitutes an "action" which may have a significant effect on the environment, overlooks the fact that landmark designations effectively act to stabilize the environment in and about a building and its neighborhood. By maintaining the existing structure, no change is effected. The environment is unaffected.

Landmark designations are not "actions" within the purview of ECL but enjoy exemption from the ECL definition of "action". ECL 8-0105(5) provides "actions" do not include: (III) maintenance or repair involving no substantial changes in existing structure of facility." Insofar as the Landmarks Law seeks only to maintain the status quo of a designated building through routine maintenance and repairs, SEQRA has no application to the subject designations.

The sixth cause of action alleging the Landmarks Law is unconstitutional for failure to exempt properties not making a reasonable return is without merit. Petitioners challenge the so-called hardship provision (Landmarks Law 25-309) which permits demolition, alteration or reconstruction on the ground of insufficient return. Petitioners argue the hardship provision is inadequate to prevent a confiscation of a landmark owner's property. Petitioners' argument erroneously presupposes a landmark designation is equivalent to a confiscation or "taking". Petitioners cite cases for the proposition that land use regulations which prevent a reasonable return or investment are confiscatory. Petitioners rely primarily

upon *Seawall Associates* v. *City of New York* (138 Misc. 2d 96) wherein the trial court held enactment of Local Law 9 of 1987 was unconstitutional as a "taking" of property. Although reversed on appeal to the Appellate Division (142 A.D.2d 72) the trial court was subsequently reinstated by the Court of Appeals (74 N.Y.2d 92 (cert. denied)) in a decision dated July 6, 1989. Local Law 9 involved a broad affirmative social action program designed to "freeze" existing single room occupancy rental units ("SRO") to help remedy the growing problem of homelessness. The law prohibited conversion, alteration or demolition of SRO units. Owners were required to rehabilitate units in their buildings and lease each such unit at a controlled rent. Substantial penalties were provided for violations. An exemption provision allowed owners, at a cost of $45,000 per unit, to convert or eliminate a unit. The cost to "buy" an exemption could be decreased upon a finding of hardship if "there is no reasonable possibility that such owners can make a reasonable rate of return" which was defined as a net annual return of 8-1/2% of the assessed value of the property as an SRO. The Court of Appeals found Local Law 9 unconstitutional as a *per se* physical "taking" without compensation "because it interfere[s] so drastically with the SRO property owners' fundamental rights to possess and to exclude. The law requires nothing less of the owners than 'to suffer the physical occupation of [their] building[s] by third parties' [citations omitted]" [74 N.Y.2d 92, 106]. The court also found even if there was no physical "taking", Local Law 9 "would still be facially invalid as a regulatory taking." Citing *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, the Court of Appeals stated:

> "There is no 'set formula' for determining in all cases when an adjustment of rights has reached the point when 'justice and fairness' require that compensation be paid. It is basic, however, that such a burdenshifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner eco-

> nomically viable use of his property, or (2) if it does not substantially advance legitimate state interests."

Also relevant here, the Court of Appeals stated:

> "The effect of Local Law No. 9 is unlike that of the Landmarks Law in Penn Central, which denied the owner of Grand Central neither the continued full use of its property nor a reasonable return on its investment."

As a footnote the Court of Appeals stated:

> "Moreover, the [Supreme] Court in *Penn Central* pointed out that, while the Landmarks Commission had denied an application to build more than 50 stories above the terminal, there was no showing that permission to build fewer would be denied. Additionally, the Court noted that Penn Central had not been deprived of all pre-existing air rights, since under the law these rights were transferable (438 U.S. 104, 136-137)."

The point here is, *Seawall* and *Penn Central* do not support petitioners' argument that the Landmarks Law and the hardship provision in particular are confiscatory in denying a reasonable return to the owner. The Court of Appeals expressly differentiated the effect of a use regulation such as Local Law 9 versus a landmark designation. Whereas a regulation affecting use of the property may result in an unlawful "taking", a landmark designation denies the owner "neither the continued full use of its property nor a reasonable return."

It was not the hardship provision or the rate that rendered Local Law 9 invalid. In *Seawall*, the trial court found, *inter alia*, Local Law 9

> "so onerous a burden on the property regulated and in effect deprives the owner of a reasonable income or other private use of his property thereby destroying its economic value, a regulation of this type amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid."

Therefore, to argue as petitioners do that because the 8-1/2% hardship provision under Local Law 9 was unconstitutional, the 6% hardship provision under the Landmarks Law must also be unconstitutional, overlooks the legal import of Seawall.

The seventh, eighth and ninth causes of action challenging the Special Demolition Permit Requirement ("SDP") in ZR 81-742 are without merit. The Zoning Resolution provides:

> "81-742 Restrictions on Demolition of Theatres.
>
> No demolition permit shall be issued by the Department of Buildings for any theatre listed in this section as a "listed theatre," unless:
>
> (a) It is an unsafe building and demolition is required pursuant to the provisions of Section 26-235 to 26-243 (Title 26, Chapter 1, Article 8. Unsafe Buildings and Property); or
>
> (b) It has been designated a landmark by the Landmark Preservation Commission and a notice to proceed has been issued to the owner pursuant to Section 25-309 of the Administrative Code permitting demolition that contemplates removal of the theatre from theatre use; or
>
> (c) The City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action permits its demolition upon making the following findings:
>
> (1) That demolition of the theatre structure will not unduly diminish the character of the Theatre District as a cultural, entertainment and theatrical showcase, taking into consideration any or all of the following factors:
>
> (i) Current physical characteristics of the theatre that affect its suitability as a legitimate theatre, including but not limited to seating capacity, configuration and location,
>
> (ii) History of its use as a legitimate theatre presenting legitimate attractions to the general public,

(iii) Likelihood of its future use for legitimate theatre production under reasonable terms and conditions generally prevailing in the theatre industry, and

(iv) Applicant's plans, if any, for replacement of the theatre structure with a development containing replacement uses supportive of the character of the theatre subdistrict, and

(2) That there exists a legal commitment binding upon all parties in interest of the zoning lot containing the theatre that any development or enlargement on a zoning lot containing a portion or all of the former site of the listed theatre shall reserve floor space at least equivalent in amount to the total floor area of the theatre devoted exclusively to uses described in Section 81725 (entertainment related uses) and meeting the requirements of Section 81-724 (requirements for entertainment-related uses) for the lift of such development or enlargement. If the area of the zoning lot containing the theatre is less than 20,000 square feet and the Commission finds that the allocation of floor space at least equivalent in amount to the total floor area of the theatre to uses described in Section 81-725 (entertainment-related uses) is impractical or unreasonable, the Commission may authorize a reduction in the amount of area allocated to such uses. Any development or enlargement on a zoning lot containing a portion or all of the former site of a listed theatre musts, however, meet the requirements of Section 81724 (requirements for entertainment-related uses), whether or not the zoning lot is located within the area described in that Section.

The theatre to which the provisions of this section apply are predominantly free standing theatres with full stage and wings and are identified as listed theatres in Table 1 below. (See Exhibit A).

In the case of an existing legitimate theatre for whose construction bonus floor area was granted pursuant to

regulations in effect prior to the effective date of this amendment; no provision of this amendment shall be construed as changing any previously existing responsibility of the owner or lessee of such theatre for continuance of its use as a legitimate theatre."

Petitioners assert that SPD is an unauthorized use of police power and not permitted under city and state law, and should be invalidated because it is discriminatory in nature and fails to exempt properties not yielding a fair return. Petitioners argue that General City Law 20(25), the source from which the city derives its zoning powers, does not authorize the CPC to enact the SDP because it is a "site specific" zoning regulation, "isolating specific buildings in a district for different treatment from other similarly situated buildings." Petitioners state there is no authority to single out 44 parcels by name and subject them to special zoning requirements. Petitioners concede the preservation of Broadway theatres in midtown "constitutes a viable public goal" but suggest "such goal cannot be achieved by fiat" but by other means such as by equal restrictions on all owners of property in the Theatre Subdistrict promoting theatre use on their property, by enacting voluntary incentive programs or by purchase from the owners at fair market value. Petitioners conclude "whether characterized as reverse spot zoning, discriminatory zoning or frustration of property rights, the City's SDP is impermissible and should be annulled."

In support of these arguments petitioners rely primarily upon three cases—*Vernon Park Realty, Inc.* v. *City of Mount Vernon*, 307 N.Y. 493; *Westwood Forest Estates* v. *Village of South Nyack*, 23 N.Y.2d 424 and *Fred F. French Investing Co.* v. *City of New York*, 39 N.Y.2d 587, *cert. denied*, 429 U.S. 990. Upon review of these cases, however, the Court finds they are inapposite and thus not controlling on any of the three arguments against the SDP.

Vernon Park involved a parcel of land adjacent to a railroad station in the middle of a heavily developed business district. The property had always been used for parking even though the property itself was residentially zoned. Both the

business and residential districts were pursuant to 1927 zoning ordinances. Parking was permitted as a valid nonconforming use. In 1932 a variance was granted permitting installation of a gasoline station. In 1951, plaintiff took title and was denied a variance for a retail shopping center under the 1927 zoning ordinance (residential). While an action to annul the 1927 zoning ordinance was pending, the City of Mount Vernon amended the zoning ordinance to prohibit the use of plaintiff's property for any purpose other than for a service station and parking. Plaintiff proved the property had no value for residential use and that the amendment effectively destroyed the greater part of the value of the property for which it was most readily adapted—a business use. In Vernon Park, the Court of Appeals found the zoning ordinance invalid because it was "so unreasonable and arbitrary as to constitute an invasion of property rights contrary to constitutional due process. . . ."

Westwood involved a zoning ordinance amendment barring new construction of multiple dwellings throughout the Village of South Nyack in order to alleviate an existing burden on the Village's sewage disposal plant. The Court of Appeals found the amendment invalid because it was not properly related to zoning purposes and restricted the owner's property to a use fo which it was not adaptable. The Court also found the amendment was not adopted in furtherance of a comprehensive plan.

Fred F. French Investing involved an amendment to the New York City Zoning Resolution purporting to create a "special park district", reasoned two private parks in a midtown residential complex then zoned for residential and office building use, exclusively for use as parks open to the public and granted the owner certain development rights which could be transferred to some other unspecified parcel. The Court of Appeals found the amendment unconstitutional as an unreasonable exercise of the police power to regulate private property use without due process of law because it deprived the owner of all property rights except bare title and certain other dubious rights.

In each of these three cases, the invalidated zoning measures were found to have denied the owners the full or value of their properties, that the proposed measures were not properly related to zoning purposes or not adopted in furtherance of a comprehensive zoning plan. Another case cited by petitioners is *De Sena* v. *Gulde*, 24 A.D.2d 165, wherein an amendment to a village zoning ordinance placed plaintiff's and an adjoining property into a light manufacturing district pursuant to a preexisting master plan. Because of boycotting, picketing and threats of economic damage by certain members of the community who sought to make race an issue out of the zoning amendment, the Board of Trustees adopted another amendment placing the same area into a residential district. The subsequent amendment was declared illegal because the Board failed to follow its own master plan or its conviction as to the most appropriate use of the land.

Here, the CPC has in place a comprehensive plan for the theatre district first created in 1967. The plan was enacted in three phases and adopted by the BOE on February 5, 1987, October 29, 1987 and April 28, 1988. Phase I applied to certain zoning lots and regulates lighting, signs and lowscale street walls with building set backs. (ZR 88-723, 732 and 81-75). These provisions were designed to preserve the scale and low density in the core area of Broadway consistent with preserving the character of the area as an entertainment related area. (See ZR 81-00(h)). In order to encourage preservation of existing theatres, Phase II discontinued the bonuses provided earlier to attract construction of new theatres. To ensure continuity in the character of the area, new developments were required to reserve a certain floor area for entertainment related use. A new development might not have to reserve floor area for entertainment uses if the new development was in a merged zoning lot with a theatre. (See ZR 81-722, 721 and 725).

The SDP (ZR 81-742) was included in ZR 81-74, which had been enacted in 1982 then extended and modified and later made permanent. An environmental review by the City was conducted as part of the adoption of these provisions. The review resulted in the issuance of a Certificate of No Effect

or negative declaration, dated April 20, 1987, as revised September 2, 1987. A public hearing (July 8, 1987) before the CPC was held after Community Board No. 5 approved the provision on June 11, 1986. A CPC report (September 2, 1987) recommended these provisions be made permanent. On October 29, 1987 the BOE adopted them.

All of the provisions in ZR 81-72 to 81-74 were made permanent under Phase II. These provisions, originally adopted in 1982, include those which are beneficial to theatre owners such as a bonus for rehabilitation of listed theatres (ZR 81745), the allowance for relocation of bulk across zoning district lines (ZR 81-746), the transfer of interior-only landmark TDRs (ZR 81-747(a)) and the transfer of TDRs through a common chain of ownership (ZR 81-747(b)). Some theatre owners have already benefited from some of these provisions. They only challenge the restriction on demolition.

The SDP applies only to listed theatres not designated a landmark. Respondents point out as a practical matter, there are only three theatres, the Broadway, the Nederlander and the Ritz, that are subject to the special demolition permit procedure and because the Broadway and the Ritz have already sold their TDRs, the SDP is not much of a restriction on them. The Nederlander remains as the only theatre restricted by the SDP. Petitioners do not deny respondents' analysis narrowing the application of the SDP to three theatres and ultimately to the Nederlander. Since its enactment in 1982, no theatre owner has ever applied for a special demolition permit and no applications are pending consistent with petitioners' representation they have no present intent to demolish any of their theatres.

The record also shows special permits for demolition are required in other special districts and each requires satisfaction of particular criteria.

Respondents cite *Asian Americans for Equality* v. *Koch*, (72 N.Y.2d 121) where, in upholding the Special Manhattan Bridge District, the Court of Appeals stated, among other things, special district zoning "can be used as an incentive to further growth and development of the community rather than as a restraint" and "is one of several imaginative legis-

lative schemes intended to encourage, or even coerce, private development into making the city a more pleasant and efficient place to live and work." The Court noted that by use of special district incentive plans, the city has "encouraged the preservation and development of the Broadway Theatre District," among others.

Where legislation is challenged the Court must decide "only whether the means chosen are constitutional and related to the evil sought to be abolished" and not "whether the legislature has chosen the best remedy. . . ." (*Staten Island Loaders* v. *Waterfront Commission*, 117 F.Supp. 308, *aff'd* 347 U.S. 439). If legislation enacted pursuant to a state's police power bears a rational relationship to a legitimate government interest, it will be upheld. (*United States* v. *Carolen Products Co.*, 304 U.S. 144; *Grossman* v. *Baumgartner*, 17 N.Y.2d 345).

In *Kravetz* v. *Plenge*, 84 A.D.2d 422, the Appellate Division, Fourth Department, stated:

> "Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of the property and to the detriment of the other owners [citations omitted]. Where the enacting authority acts in accordance with a comprehensive plan it will not be condemned as spot zoning, even though it singles out and affects but one lot or creates a small area in the center of a larger zone devoted to a different use [citations omitted]." (At 428).

In *Penn Central*, *supra*, the U.S. Supreme Court stated:

> "It is time, as appellants emphasize, that both historic district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellant's suggestions, landmark laws are not like discriminatory, or 'reverse spot' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment other than the

> neighboring ones. [citation omitted]. In contrast to discriminatory zoning, which is the anithesis of land use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the City. . . ." (At 132)

There is no spot zoning, reverse spot zoning or discriminatory zoning here. There is no "arbitrary singling out of a particular parcel for different less favorable treatment than the neighboring ones." GCL 20(24) provides "such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts."

Petitioners' reply memorandum correctly recognizes that the cases cited by respondents involved and upheld zoning restrictions imposed on classes of structures treating similarly situated parcels in a uniform fashion. The record here shows the listed theatres share a sufficiently common heritage, architecturally, historically, culturally and aesthetically as to be fairly viewed as a class of buildings in the Special Theatre District.

There is a limited scope of review applicable to municipal zoning ordinances (*See Kurzius, Inc.* v. *Upper Brookville*, 51 N.Y.2d 338; *Town of Huntington* v. *Park Shore Country Day Camp*, 47 N.Y.2d 61) which are given a strong presumption of constitutionality. Moreover, there is a heavy burden on the challenger to rebut the presumption by demonstrating unconstitutionality beyond a reasonable doubt. (*Asian American* v. *Koch*, *supra*).

There can be no question but that the City has a comprehensive plan and that preservation of the character of the Special Theatre District is an appropriate planning objective. Economic considerations and goals are within the bounds of legitimate government interests. (*See Matter of Wolfsohn* v. *Burden*, 211 N.Y. 288 and *Walkbroadway Realty Inc.* v. *New York Board of Standards and Appeals*, Sup. Ct. N.Y. Co., Index #25071/82, July 3, 1985). The City is legislatively endowed with the power "to regulate and limit the height,

bulk and location of buildings hereafter erected" (GCL 20(24)) and "to regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purpose to divide the City into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered" (GCL 20(25)).

Commendably, petitioners have no present intent to demolish any of their theatres and they agree preservation is a viable public goal. The record reveals, however, that petitioners concerns are all related to the economics of their investments. Indeed, petitioners suggest other means by which they think the City might achieve its goals with less of a burden on them. While property owners cannot be faulted for wanting less regulation it is not this Court's prerogative to fulfill those wishes absent a demonstration of a violation of rights. No such violation has been found on this record. The SDP is only one element of the zoning resolution amendments applicable to the Special Theatre District. The Court finds, as it must, the SDP promotes and conserves the most desirable use for land in the Special Theatre District in accordance with City's well-considered, comprehensive, master plan. Therefore, the SDP is not an unauthorized use of the police power and is permitted under City and State law and is not discriminatory zoning.

The argument the SDP fails to include a hardship provision to exempt property not yielding a fair return is of no avail. Pursuant to ZR 72-01(B), the Board of Standards and Appeals ("BSA") has the power to "hear, decide and determine in a specific case of practical difficulties or unnecessary hardship, whether to vary the application of the provisions of this resolution". A hardship provision need not be spelled out in each chapter of the zoning resolution as the BSA has the authority to grant a variance from the Special Demolition Permit requirements under ZR 72-21. In addition, there is evidence in the record that petitioners requested there be only one hardship hearing at LPC. Therefore, petitioners may apply for hardship relief from the SDP at either the LPC or

the BSA notwithstanding the absence of such right in ZR 81-742.

The tenth cause of action is without merit. On the issue of a "taking" without just compensation, *Penn Central* and *Seawall* are controlling authority. In *Penn Central*, Justice Brennan stated:

> "The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'."

The question was answered in the affirmative. The grant of landmark status does not effect a "taking." The designations of petitioners' theatre contemplate a continuity of use as theatres. Petitioners are nevertheless free to change the uses to which their buildings may be put. The Landmarks Law does not concern itself with use so long as the use will not adversely affect the protected architectural features.

Petitioners have not distinguished the relevant facts in this case from those in *Penn Central.* Instead, petitioners argue respondents' citation to *Penn Central* is unnecessary because petitioners do not question the City's police power to preserve buildings through landmarking procedures. Further, petitioners state the Landmarks Law should not be invalidated simply because it inhibits development or improvement of private property nor that it strips all value from petitioners' property. What petitioners contend is that there must be a "causal relationship" between the Landmark Law and the police power goal. Petitioners maintain this "causal relationship" requirement is mandated by GML 96-A and *Nollan* v. *California Coastal Commission*, 197 S. Ct. 3141. Petitioners conclude their argument by alleging "respondents cannot satisfy the strict causal relationship test required in Nollan. . .".

GML 96-A requires that measures in "the exercise of police power, shall be reasonable and appropriate to the pur-

pose, or if constituting a "taking" of private property shall provide for due compensation, which may include the limitation or remission of taxes". In *Nollan*, the U.S. Supreme Court stated:

> "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' *Agins* v. *Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). *See also Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 127, 98 S. Ct. 2646, 2660, 57 L. Ed. 2d 631 (1978) ("A use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose. Our cases have not elaborated on the standards for determining what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." (*Id.* at 3147)

Continuing, the *Nollan* court stated that "a broad range of governmental purposes and regulations satisfies these requirements." One such example was *Penn Central* wherein the Court did a thorough analysis of the Landmarks Law in New York and rejected a claim of "taking". The Court found the regulation substantially advanced a legitimate state interest of preserving Grand Central Terminal. Therefore, however the 'test' in *Nollan* may be defined, *Penn Central* held that the New York Landmarks Law met the test. A fortiori, the "reasonable and appropriate" test in GML 96-A is also met.

This Court finds that preservation of certain theatres and the industry of theatre production in the Special Theatre District in New York City is a legitimate government interest which is substantially advanced by the Landmarks Law. The theatre industry in New York is an integral part of the American cultural fabric and the economy of New York City and State. Reference is here made to the declaration of public policy set forth in Landmarks Law 25-301(b). It clearly states that the protection and perpetuation of improvements of special character or special historical or aesthetic interest or

value is a public necessity required in the interest of the health, prosperity, safety and welfare of the people. The purpose of the policy is expressly set forth and includes fostering civic pride in the beauty and noble accomplishments of the past, the protection and enhancement of the City's attractions to tourists and visitors and the support and simulus to business and industry thereby provided, to strengthen the economy of the City and to promote the use of historic district landmarks and interior landmarks for the education, pleasure and welfare of the people.

The eleventh cause of action alleges damages of not less than $200,000,000. Alleging it does not make it so. No evidentiary proof is offered to show a genuine issue of fact. No factual allegations are found in the pleadings to support this cause of action. It is not clear to the Court whether this claim of damage is asserted in relation to the "taking" argument or as a separate claim for diminished value of air rights. No probative evidence is offered to show diminution of such rights or the value thereof. Conclusory arguments have no merit and are insufficient to defeat respondents' cross-motion for summary judgment.

Contrary to petitioners' arguments respondents have presented an affidavit directly refuting petitioners' allegations with a factual analysis of air rights in connection with petitioners' properties. The analysis lists the permitted FAR, the allowable bulk, approximate existing bulk and unused residual bulk for each of twenty theatres owned by petitioners. The factual statements in the affidavit belie petitioners' conclusions. No issue of fact is found to defeat the cross-motion relative to the eleventh cause of action.

Accordingly, respondents' cross-motion for dismissal is granted.

Settle Order and Judgment in accordance with the foregoing decision.

Dated: December 5, 1989

/s/ I.V. Santaella
J.S.C.

New York Court of Appeals
Dismissal of Appeal

Sept. 10, 1991
(Reported at 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456)

APPEALS ON CONSTITUTIONAL GROUNDS
Decided September 10, 1991

Shubert Org., Inc., Matter of,

v.

Landmarks Preservation Commn. of City of N.Y.
. . . (1st Dept.: 166 A.D.2d 115) . . . appeal dismissed

New York Court of Appeals
Denial of Leave to Appeal

December 18, 1991
(Reported at ____ N.Y.2d ____, ____ N.E.2d ____, ____ N.Y.S.2d ____)

MOTIONS
Decided December 18, 1991

1200. MATTER OF THE SHUBERT ORGANIZATION, INC., ap. (Landmarks Preservation Commission of the City of New York, res)—Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction expenses. Judge Kaye took no part.

NEW YORK CITY LANDMARKS LAW
New York City Administrative Code, Title 25, Chapter 3

Chapter 3

LANDMARKS PRESERVATION AND HISTORIC DISTRICTS

§ 25-301 Purpose and declaration of public policy.
§ 25-302 Definitions.
§ 25-303 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.
§ 25-304 Scope of commission's powers.
§ 25-305 Regulation of construction, reconstruction, alternations and demolition.
§ 25-306 Determination of request for certificate of no effect on protected architectural features.
§ 25-307 Factors governing issuance of certificate of appropriateness.
§ 25-308 Procedure for determination of request for certificate of appropriateness.
§ 25-309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return.
§ 25-310 Regulation of minor work.
§ 25-311 Maintenance and repair of improvements.
§ 25-312 Remedying of dangerous conditions.
§ 25-313 Public hearings; conferences.
§ 25-314 Extension of time for action by commission.
§ 25-315 Determinations of the commission; notice thereof.
§ 25-316 Transmission of certificates and applications to proper city agency.
§ 25-317 Penalties for violations; enforcement.
§ 25-318 Reports by commission on plans for proposed projects.
§ 25-319 Regulations.
§ 25-320 Investigations and reports.
§ 25-321 Applicability.

§ 25-301 Purpose and declaration of public policy. a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior

landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 25-302 Definitions. As used in this chapter, the following terms shall mean and include:

a. "Alteration." Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest." Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return." Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project." Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or the mode of financial assistance, exercise of the city's powers of eminent domain, contribution of

city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission." The landmarks preservation commission.

f. "Day." Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 25-317 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes, provided however, that the term "improvement parcel" shall also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter.

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials compromising an improvement, including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 25-319 of this chapter, the surfacing, resurfacing, painting, renovating, restoring or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement;

for which a permit issued by the department of buildings is not required by law, where the purpose and effect of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled, upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 25-309 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the requests for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as a result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improved parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25-309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

§ 25-203 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts. a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate and, as herein provided in subdivision j, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of scenic landmarks, located on property owned by the city, which are identified by a description set-

ting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and, in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 25-318. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision.

e. Subject to the provisions of subdivision g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the department of health.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to the board of estimate a report with respect to the relation of such designation or amendment thereof to the zoning resolution, projected public improvements and any plans for the development, growth, improvement or renewal of the area involved.

(2) The board of estimate may modify or disapprove such designation or amendment thereof within ninety days after a copy thereof is filed with the secretary of the board provided that the planning commission has submitted the report required by this subdivision or that thirty days have elapsed since the referral of the designation or amendment to the commission by the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to the board of estimate a report with respect to the relation of such proposed rescission to the zoning resolution, projected public improvements and any plans for the development, growth, improvement, or renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the res-

olution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to subdivision a shall be made pursuant to notices of public hearings given, as provided in section 25-313.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic landmark or any amendment or any such designation or rescission thereof, the commission shall cause to be recorded in the office of the register of the city of New York in the county of which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the county of Richmond in the office of the clerk of said county of Richmond, a notiee of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers, and its tax map, block and lot number or numbers, and in the case of all other counties, by its land map and lot number or numbers.

§ 25-304 Scope of commission's powers. a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other

open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 25-305 Regulation of construction, reconstruction, alterations and demolition. a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district or any part of an improvement containing an interior landmark to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause to permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision

a of section 25-318 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 25-312 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 25-318 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the

city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The applicant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application or amended application, every such applicant shall file with the commission a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

§ 25-306 Determination of request for certificate of no effect on protected architectural features. a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done; and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines

such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten-day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

§ 25-307 Factors governing issuance of certificate of appropriateness. a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 25-306 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 25-309 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 25-304 of this chapter, and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 25-304 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or reconstruction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features of the landmark, and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

§ **25-308 Procedure for determination of request for certificate of appropriateness.** The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 25-309 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ 25-309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return. a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which include such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom;

the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 25-307 of this chapter, shall, within ninety days after the filing of the request for such certificate of appropriateness, make a preliminary determination of insufficient return.

(2) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or section four hundred fifty-eight, four hundred sixty or four hundred seventy-five of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to section four hundred twenty-a, four hundred twenty-two, four hundred twenty-four, four hundred twenty-five, four hundred twenty-six, four hundred twenty-seven, four hundred twenty-eight, four hundred thirty, four hundred thirty-two, four hundred thirty-four, four hundred thirty-six, four hundred thirty-eight, four hundred forty, four hundred forty-two, four hundred forty-four, four hundred fifty, four hundred fifty-two, four hundred sixty-two, four hundred sixty-four, four hundred sixty-eight, four hundred seventy, four hundred seventy-two or four hundred seventy-four of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) The owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) The improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) Such improvement has ceased to be adequate, suitable or appropriate for use in carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes which it had been devoted when acquired unless such owner is not longer engaged in pursuing such purposes; and

(d) The prospective purchaser or tenant:

(1) In the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) In the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each such succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the first fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejected filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c and d of this section within the period of time prescribed by such subdivision d; or

(b) The commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) A plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) Give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such inter-

est or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) Enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a pur-

chaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one hundred eighty day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one hundred eighty day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the may a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give

notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona-fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ **25-310 Regulation of minor work.** a. (1) Except as otherwise provided in section 25-312 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work. (2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for

such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as practicable, certify to the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application is hereinafter provided.

c. (1) The commission shall determine:

(a) Whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; and

(b) If such work would have such effect, whether judged by the standards set forth in subdivisions b, c, d an e of section 25-307 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision c in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as pre-

scribed in subparagraph two of subdivision a of section 25-306 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 25-318 of this chapter and to any city-aided project.

§ 25-311 Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 25-312 Remedying of dangerous conditions. a. In any case where the department of buildings, the fire department or the department of health, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of rem-

edying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance or issuance of any such order or direction.

§ **25-213 Public hearings; conferences.** a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof or the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or her or their last known address or addresses, as the same appear in the records of the office of the commissioner of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notices shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 25-306 and 25-310 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or on any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the commissioner of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 25-314 Extension of time for action by commission. Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriate-

ness or a merit for minor work, the applicant may extend such period of time by his or her written consent filed with the commission.

§ 25-315 Determinations of the commission; notice thereof. a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination, and of any preliminary determination of insufficient return made pursuant to paragraph one of subdivision a of section 25-309 of this chapter, to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 25-304 of this chapter, any determination of the commission granting a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivisions g and i of section 25-309 of this chapter.

§ 25-316 Transmission of certificates and applications to proper city agency. In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolu-

tion, the commission shall transmit such certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ **25-317 Penalties for violations; enforcement.** a. Any person who violates any provision of subdivision a of section 23305 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 25-310 of this chapter or any provision of section 25311 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, wilfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 25-305 of this chapter or paragraph two of subdivision a of section 25-310 of this chapter or any violation of the provisions of section 25-311 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 25-318 Reports by commission on plans for proposed projects. a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark;

shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a cityaided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the

commission a report on such plans, proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency, and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within forty-five days after such referral.

c. Except as provided in subdivision d of section 25-303, where the commission so requests, plans for the construction, reconstruction, alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to confirm with applicable laws concerning regulation of lots, storm water disposal and water courses. The commissioner of parks and recreation may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

§ 25-319 Regulations. The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of section 25-304 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions

of an historic district and may vary from area to area in their provisions;

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 25309 of this chapter;

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 25-320 Investigations and reports. The commission may make such investigations and studies of matters relating to the protection, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks, scenic landmarks and buildings in historic districts as the commission may, from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 25-321 Applicability. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation, or amended or modified designation, pursuant to the provisions of section 25-303 of this chapter, first making the pro-

visions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.

NEW YORK CITY ZONING RESOLUTION § 81-742

81-742
Restrictions on demolition of theatres

No demolition permit shall be issued by the Department of Buildings for any theatre listed in this Section as a "listed theatre", unless:

(a) it is an unsafe building and demolition is required pursuant to the provisions of Sections 26-235 to 26-243 (Title 26, Chapter 1, Article 8, Unsafe Buildings and Property) Administrative Code;

(b) it has been designated a landmark by the Landmarks Preservation Commission and a notice to proceed has been issued to the owner pursuant to Section 25-309 of the Administrative Code permitting demolition that contemplates removal of the theatre from theatre use; or

(c) the City Planning Commission, by special permit after public notice and hearing and subject to Board of Estimate action, permits its demolition upon making the following findings:

(1) that demolition of the theatre structure will not unduly diminish the character of the Theatre subdistrict as a cultural, entertainment and theatrical showcase, taking into consideration any or all of the following list of factors:

(i) current physical characteristics of the theatre that affect its suitability as a legitimate theatre, including but not limited to seating capacity, configuration and location;

(ii) history of its use as a legitimate theatre, presenting legitimate attractions to the general public;

(iii) likelihood of its future use for legitimate theatre production under reasonable terms and

conditions generally prevailing in the theatre industry;

(iv) applicant's plans, if any, for replacement of the theatre structure with a development containing replacement uses supportive of the character of the Theatre subdistrict; and

(2) that there exists a legal commitment binding upon all parties in interest of the zoning lot containing the theatre that any development or enlargement on a zoning lot containing a portion or all of the former site of the listed theatre shall reserve floor space at least equivalent in amount to the floor area of the theatre devoted exclusively to uses described in Section 81-725 (Entertainment-related uses) and meeting the requirements of Section 81-724 (Requirements for entertainment-related uses) for the life of such development or enlargement. If the area of the zoning lot containing the theatre is less than 20,000 square feet and the Commission finds that the allocation of floor space at least equivalent in amount to the total floor area of the theatre to uses described in Section 81-725 (Entertainment-related uses) is impractical or unreasonable, the Commission may authorize a reduction in the amount of the area allocated to such uses. Any development or enlargement on a zoning lot containing a portion or all of the former site of a listed theatre must, however, meet the requirements of Section 81-724 (Requirements for entertainment-related uses), whether or not the zoning lot is located within the area described in that section.

The theatres to which the provisions of this Section apply are predominantly free standing theatres with full stage and wings and are identified as listed theatres in Table 1 below.

[table omitted]

In the case of an existing legitimate theatre for which construction bonus floor area was granted pursuant to regulations in effect prior to May 13, 1982, no provision of this

amendment shall be construed as changing any previously existing responsibility of the owner or lessee of such theatre for continuance of its use as a legitimate theatre.

Transcript of Proceedings Before
Landmarks Preservation Commission

(Appellate Record p. 1354; 12/09/86)

Chairman Norman: Arguing back and forth about that. The numbers of items that the staff has identified, and hopefully you too will agree, represent significant details either on the interior or the exterior of the building, is viewed by the owners as problematic, particularly when it comes to replacing any of those items due to the cost factors that may be involved. And as you know, the Commission does not look to cost in terms of how these things are—are replaced or changes made on a building. We rather look to the appearance, the—the look of it, and—and we hope that ways can be found to achieve that—that appearance without an overly huge expenditure of money. And we work with applicants continually, and you know this, to find innovative and creative ways to satisfy those needs. So the argument that cost should be considered by the Commission, I have rejected. We hope that the owners will understand that our guidelines are created in a way to enhance their capability of meeting the requirements of regulation. As you know, we worked very long and hard about trying to define clearly their need for production-related changes, and we've developed a format and a procedure which enables them to make production-related changes without a lot of delay—without *any* delay, I would say—and in a way that does not require a good deal of staff interface. I think I believe them when they say that there are changes that go on, but I certainly do not believe them when they talk about the magnitude of changes [indiscernible]. It's very, very seldom that an entire theatre's completely revamped just to take care of production. "Cats" is rarity and an unusual step.

Transcript of Proceedings Before Landmarks Preservation Commission

(Appellate Record p. 2313; 06/17/86)

Commissioner Robbins: * * *

From an architectural point of view the theatres are no great shakes, but we are not here to talk about them as architectural because if they were, I would have to maintain the same position: They are no great shakes.

Supreme Court, U.S.
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No. 91-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., et al.,
Petitioners,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

RESPONDENT SAVE THE THEATRES' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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April 27, 1992

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below properly reject an as-applied takings challenge to theatre landmark designations, where the landmark designations substantially advanced New York City's legitimate interest in historic preservation, did not deny the theatre owners economically viable use of their property, and where the theatre owners failed to pursue available administrative remedies to establish and relieve alleged economic hardship?

2. Should this Court reconsider its decision in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), which is consistent with the Court's subsequent Takings Clause decisions, in a factual context in which such reconsideration is unnecessary?

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RESPONDENT SAVE THE THEATRES' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

Introduction

Respondent Save the Theatres, Inc. ("Save the Theatres") respectfully urges the Court to deny the writ of certiorari sought by The Shubert Organization, Inc., et al. ("Petitioners") to review the May 16, 1991 decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the dismissal of Petitioners' complaint. Petitioners seek nullification of New York City's designation as landmarks of twenty-two historic Broadway theatres. Save the Theatres is a nonprofit organization of actors, directors, choreographers, designers, and writers who create Broadway theatre. It was formed in

1982 to educate the public concerning the architectural and cultural importance of historic theatres.[1]

The 1982 Demolitions

In 1982, the Broadway theatre community was shaken by the demolition of five theatres, including the Helen Hayes and Morosco, two historic and successful theatres that formed an important part of Broadway's theatre heritage and that were eligible for inclusion on the National Register of Historic Places. A 2.[2] The theatres were destroyed to pave the way for construction of the Marriott Marquis Hotel project, sponsored by New York City, the stated purpose of which was to contribute to the revitalization of the Broadway theatre district.

The Marriott Marquis Hotel project was funded in part by an Urban Development Action Grant through the United States Department of Housing and Urban Development. That agency conditioned ultimate permission to demolish the theatres on mitigating measures that included a building-by-building review of each of the remaining historic Broadway theatres to determine if any was eligible for local or national designation as a landmark. A 2.

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1. Save the Theatres was granted leave to intervene as a party respondent by the trial court. JA 2970. Save the Theatres is a not-for-profit corporation under the laws of the State of New York. It has no parent companies or subsidiaries.

2. References to the Appendix to this Brief in Opposition to The Petition for a Writ of Certiorari are cited as "A _." References to the Appendix to the Petition are cited as "PA _." References to the Joint Appendix in the Supreme Court, Appellate Division, First Judicial Department of the State of New York are cited as "JA _." References to the full Record on Appeal before the Supreme Court, Appellate Division, First Judicial Department of the State of New York are cited as "RA __."

The 1982 Public Hearings

New York City's Landmarks Preservation Commission (the "Landmarks Commission") held public hearings on proposed designations of various Broadway theatres on June 14-15, 1982.[3] Testimony from architects in support of the designations informed the Landmarks Commission of the technology of theatre design, including acoustics, sightlines, audience/stage relationships and decorative schemes, and explained the relationship between the excellence of these elements found in the Broadway houses and the success of the Broadway theatre experience. Save the Theatres detailed the production histories and architectural features that made each theatre important. Historians, critics, and theatre professionals placed the theatres within the context of the development of American musical and dramatic theatre, and described how the future of these art forms depended on the existence of these singular spaces. A 7.[4]

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3. Forty-five theatres were calendared for consideration, 38 for both exterior and interior designations and seven for interior designation only. A 7.

4. See Affidavit of the late actress Colleen Dewhurst: "The acoustics in the old Broadway houses, the sight lines, their configurations and decor, enable the actor immediately and intimately to make contact with the audience. That is the crucial element in our art. The old Broadway houses were built with deep, implicit respect for the importance of that principle: contact among people." A 30. See also Affidavit of set designer Ming Cho Lee: "The designated Broadway theatres are unique in the world. Elements of their interior design and ornamentation were crafted by hand; we have lost the art of building theatres that way. Interior features give the theatre its human scale, which in turn permits the intimate communication vital to live

(continued...)

On October 19, 1982 the designation hearings continued. The affected New York City Community Board supported approximately three-quarters of the proposed designations, and documented its recommendations with specific, detailed research. A 8.

The Hardy Report

On April 22, 1983, Petitioners themselves submitted to the Landmarks Commission a report prepared by their architectural consultant Hugh Hardy (the "Hardy Report"). R 1839-2065. Over 200 pages long, the Hardy Report concluded that "taken as a whole these 30 buildings [owned by Petitioners] are economically culturally and physically irreplaceable." A 40. Mr. Hardy rated every one of the 30 theatres he studied within the "A" (highest) range with regard to the five factors that he considered relevant for consideration by the Commission. See A 40-41.[5]

The Theatre Interior Guidelines

During the Landmarks Commission's consideration of the proposed designations, Petitioners raised the concern that interior designations could restrict the creative freedom

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4.(...continued)
theatre. . . . It is that essential sympathy, established within the physical world of the theatre interior, that provides the opportunity for connection between audience and performer, and between our present and our past." A 25-26.

5. In designating a landmark, the Landmarks Commission is empowered to consider the "special historical or aesthetic interest or value [of a building, including its interior] as part of the development, heritage or cultural characteristics of the city, state or nation. . . ." N.Y.C. Admin. Code §§ 25-302(m), (n); PA 48a. N.Y.C. Admin. Code §§ 25-301 et seq. is referred to herein as the "Landmarks Law."

of set designers and producers to create a special mood for a play or musical. Petitioners contended that review of proposed changes to a theatre auditorium under the Landmarks Commission's Certificate of Appropriateness procedures would delay and increase the cost of productions. A 10; see also N.Y.C. Admin. Code §§ 25-307, 308; PA 59a-61a.

After meeting with a committee of set and lighting designers, the Landmarks Commission drafted guidelines (the "Interior Guidelines") to address Petitioners' stated concern. The Interior Guidelines provided that any reversible production related change to a designated interior could be carried out without review by the Landmarks Commission, so long as the Commission was informed by letter that changes were taking place and that the theatre would be returned to a similar state when the show closed. A 11-12.

For example, the highly successful production of "Phantom of the Opera" required front-of-house changes that were carried out smoothly under the Interior Guidelines in a theatre then calendared for landmarking. JA 2913-14.

The Interior Guidelines further provided that state of the art technical changes required by a production could be installed freely and could be carried over to an unlimited number of subsequent productions with simple notification to the Landmarks Commission. JA 5573-74.[6]

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6. In his affidavit testimony, Ming Cho Lee expressed his professional view that the Interior Guidelines "are both reasonable and essential, and will not prevent or impede in any way the mounting of productions on Broadway." A 20. Mr. Lee addressed in detail the reasonableness of and necessity for the guidelines, with regard to both production related and permanent changes to theatre interiors. A 21-25.

On December 10, 1985, the Landmarks Commission held a public hearing to discuss the proposed Interior Guidelines. R 2917-3008. At the hearing, the head of Petitioner Shubert Organization testified as follows:

> I would really like to express my appreciation to the Commissioner and the staff for the time that they have spent with us in developing these guidelines. I think that the time has been productively spent. R 2924.

After a process that included extensive consultation with experts and with Petitioners, the Landmarks Commission adopted the Interior Guidelines.[7]

The 1988 Designations

While the numerous and voluminous designation reports on theatre interiors and exteriors were being prepared, the Landmarks Commission began an exhaustive series of 29 Executive Sessions to consider the proposed theatre designations. JA 2929-31. Petitioners or their representatives attended critical Executive Sessions of the Commission, see R 2481, and met on other occasions with Landmarks Commissioners and staff, see R 2473. The Commission held intensive, long sessions during the months preceding its final vote in January 1988. These sessions included staff presentations, slides, and personal visits to the theatres. JA 2930. After these rigorous deliberations, the Landmarks Commission determined that of 75 theatre

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7. Petitioners now argue, for the first time, that the Interior Guidelines are "unauthorized by law." Petition at 4 n.5. They provide no authority for the novel proposition that the Landmarks Commission lacks power to issue guidelines designed to expedite and streamline the temporary, reversible alteration of interior landmarks.

interiors and exteriors proposed for designation, 26 interiors and 21 exteriors satisfied the applicable statutory criteria.[8] A 15.

On March 10, 1988, the Board of Estimate heard further testimony from the public, see JA 1125-1292, including extensive testimony from Petitioners, see A 1129-67. After closely questioning the Landmarks Commission Chairman, and long hours of consideration, the Board of Estimate approved the designations that had been recommended by the Landmarks Commission. JA 1312-48; A 15-16.

Petitioners' Failure To Seek Available Administrative Hardship Relief

Following the landmark designations of the theatres at issue, Petitioners did not avail themselves of the Landmarks Law's administrative hardship procedure through which, on an appropriate specific showing, restrictions on a designated property can be eased or eliminated if the landmark owner is denied reasonable economic value as a result of landmark designation. See N.Y.C. Admin. Code § 25-309; PA 62a-70a. To date, Petitioners have failed to seek administrative hardship relief with regard to any of the theatres whose designation they challenge.[9]

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8. For reasons not relevant here, eight designation decisions were made before the rest.

9. The Landmarks Law also provides two administrative procedures that allow certain alterations of a landmark under appropriate circumstances. See N.Y.C. Admin. Code §§ 25-306, 307; PA 58a-59a. Petitioners have failed to point to a single instance where they have been denied permission to alter their theatres under these procedures.

Petitioners' Litigation Challenge

Petitioners sought judicial review of the landmark designations in New York Supreme Court, New York County, alleging a host of statutory and constitutional grounds for invalidation. Petitioners moved for summary judgment and Respondents cross-moved for summary judgment. PA 13a. At oral argument on the motions for summary judgment, Petitioners requested an evidentiary hearing to inquire into the "single narrow issue" whether the New York City Board of Estimate followed routine procedure with regard to its consideration of the theatre designations. A 47; see also PA 5a. The trial court ruled that supplementation of the record through submission of affidavits on this issue was sufficient. JA 219. On December 5, 1989, the trial court granted Respondents' cross-motion to dismiss. PA 9a-42a.

On May 16, 1991, the New York Supreme Court, Appellate Division, First Judicial Department, unanimously rejected Petitioners' appeal from the trial court's judgment. PA 1a-8a. With regard to Petitioners' facial constitutional takings challenge to the Landmarks Law, the First Department found that the challenge was resolved by this Court's decision in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) ("Penn Central"). PA 6a-7a. With respect to Petitioners' as-applied constitutional takings challenge, the First Department held as follows:

> [T]he scheme of law embodied in the Landmarks Act serves a legitimate purpose of saving historical landmarks. With respect to any claim that petitioners are deprived of any economic use of their property, in the absence of final agency action on applications by petitioners for renovations or alterations, the matter is not ripe for review. In

> the meantime, there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres. In any event, transferable development rights inure to the owners of these buildings, which, absent a successful challenge, must be presumed to have economic benefit. We note that some of petitioners, in fact, have made use of these transferable development rights. PA 7a (citations omitted).

On September 19, 1991, the New York Court of Appeals dismissed Petitioners' appeal from the First Department's decision, purportedly taken as of right, on the grounds that "no substantial constitutional question is directly involved." 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456 (1991). On December 18, 1991, the New York Court of Appeals denied Petitioners' motion for leave to appeal. 78 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651 (1991). On February 26, 1992, Petitioners applied to this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioners have demonstrated no basis for granting certiorari in this fact-specific land use regulation case. The voluminous administrative record demonstrates that the theatres at issue were properly designated as landmarks based on their historical, architectural, and cultural qualities. The conclusion that the designations do not violate constitutional principles has been endorsed, without a single judge dissenting, by both the trial court and the New York Appellate Division, First Judicial Department. The New York Court of Appeals has twice determined that Petitioners' constitutional arguments are not worthy of further judicial review.

Petitioners have not alleged a conflict with a decision of another state court of last resort or with a United States Court of Appeals. See Sup. Ct. R. 10.1(b). Petitioners have failed to demonstrate that the New York Appellate Division's decision conflicts in any way with the applicable decisions of this Court. See Sup. Ct. R. 10.1(c).

Petitioners' as-applied takings challenge to the theatre landmarks designations must fail. The theatre designations further the important governmental goal of preserving New York City's historic and cultural heritage. Petitioners have failed to demonstrate that the theatre designations have caused any diminution in the value of their property. Moreover, Petitioners' unsupported claims of economic hardship are unripe because they have failed to avail themselves of the Landmarks Law's administrative hardship relief procedure.

This Court should reject Petitioners' invitation to reconsider the Penn Central decision. Petitioners concede

that such reconsideration is unnecessary in this action. Moreover, the Penn Central decision is consistent with the Court's subsequent Takings Clause decisions. Petitioners' other constitutional claims are without merit because the Landmarks Law is rationally related to a legitimate state purpose.

POINT ONE

THE NEW YORK APPELLATE DIVISION PROPERLY REJECTED PETITIONERS' AS-APPLIED TAKINGS CHALLENGE BECAUSE THE THEATRE LANDMARK DESIGNATIONS SUBSTANTIALLY ADVANCE NEW YORK CITY'S HISTORIC PRESERVATION GOALS AND DO NOT DENY PETITIONERS ECONOMICALLY VIABLE USE OF THEIR THEATRES.

Petitioners improperly urge this Court to grant certiorari to review the basic and undisputed propositions that this Court's decision in Penn Central (a) does not preclude an as-applied Takings Clause challenge to particular landmark designations and (b) requires consideration of the factors enunciated in Penn Central and subsequent Takings Clause cases. Petition at i (Questions Presented for Review). The New York Appellate Division's ruling comports with both of these well settled principles of constitutional law and requires no further review.

A. The Theatre Landmark Designations Satisfy The Well Settled Standard Applicable To Regulatory Takings Challenges.

This Court has:

> long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an

> owner economically viable use of his land," Agins v. Tiburon, 447 U.S. 255, 260 (1980).

Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). See also Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 468, 485 (1987); Penn Central, 438 U.S. at 124-127. The Court has identified several factors that have particular relevance in determining whether a taking has occurred: (a) the economic impact of the regulation on the claimant; (b) the extent to which the regulation has interfered with distinct investment-backed expectations; and (c) the character of the government action. See Bowen v. Gilliard, 483 U.S. 587, 606 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986); Penn Central, 438 U.S. at 124.[10]

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10. Here, the government character factor clearly weighs in favor of a finding that the theatre landmark designations did not effect a taking, and Petitioners do not argue to the contrary. As this Court has held:

> It is well settled that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the public good." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-438 (1982), the Court has repeatedly upheld regulations that destroy or adversely affect real property interests. [citations omitted].

Keystone, 480 U.S. at 488 n.18. The landmark designations at issue are a form of land use regulation, not a physical appropriation of Petitioners' property.

Petitioners aver that the Appellate Division ruled "in a one-sentence discussion" that their as-applied takings challenge was barred by this Court's decision in Penn Central and that the Appellate Division improperly applied a "bright-line" test. Petition at 7, 8. Petitioners' assertion is incorrect. In fact, the Appellate Division properly considered the relevant factors and concluded that Petitioners had "not carried their burden of demonstrating that the Landmarks Law as applied to these particular theatres" effected a taking. PA 7a.[11]

1. The Theatre Landmark Designations Substantially Advance New York City's Legitimate Interest In Historic Preservation.

Petitioners fail to satisfy the first prong of the Nollan test because the theatre landmark designations substantially advance New York City's legitimate interest in historic preservation. This Court "has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ." Penn Central, 438 U.S. at 129. More recently, in Nollan, this Court specifically listed landmarking as a land use regulation that is within the "broad range of governmental purposes and regulations" that satisfies the "legitimate interest" and "substantially advances" requirements. 483 U.S. at 834.

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11. The relative brevity of the Appellate Division's discussion of the takings claim (which was at any rate considerably more extensive than a "single sentence discussion") may be attributed to the fact that the central issue raised by Petitioners in the Appellate Division involved due process. The Appellate Division rejected that claim as meritless, PA 5a-6a, and Petitioners do not pursue it before this Court.

The theatre landmark designations at issue here were based on a voluminous record, including the testimony of scores of theatre professionals and interested members of the public. The record demonstrates the designated theatres to be irreplaceable architectural, historical, and cultural gems that fit snugly within the Landmarks Law criteria.[12] It is

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12. While Petitioners allege freely that their theatres were unworthy of landmark protection and that the designations were improperly motivated, see, e.g., Petition at 5 n.7 and 9 n.10, they utterly failed to substantiate these allegations at every level of the state court proceedings. See PA 24a (Trial court notes that "[p]etitioners' rather conclusory assertions that respondents' actions were, inter alia, 'ill conceived', 'shortsighted', 'drastic and illegal', 'plainly unauthorized', and 'onerous' are in sharp contrast with the contents of record.") The one citation to the administrative record that Petitioners have mustered in support of their theory, Petition at 9 n.10, a remark by a Landmarks Commissioner that "[f]rom an architectural point of view the theaters are no great shakes," is egregiously out of context. In fact, that Landmarks Commissioner then went on to state:

> We are here to -- we have to recognize that theaters are part of the history of New York and also that their physical quality makes them part of the history of New York.
>
> Their physical quality that draws people to them, that causes people to act well in them and to be heard and to be responded to and to be either acclaimed or panned by the critics the next day.
>
> This is all part of the culture. So where does one draw the line? A 48.

Far from showing discriminatory intent or improper motive, the full quotation evidences a full and accurate regard for the criteria set forth in the Landmarks Law. The Commission's struggle to draw an appropriate line was the exercise of informed, rational

(continued...)

simply beyond dispute that the theatre landmark designations substantially further an important governmental goal, as both the New York Appellate Division, PA 7a, and the trial court, PA 41a, properly concluded.[13]

2. The Theatre Landmark Designations Do Not Deny Petitioners Economically Viable Use Of Their Property.

Petitioners have not approached, much less satisfied, the second prong of the Nollan test because they have failed to prove that the theatre landmark designations deny them economically viable use of their land, see Nollan, 483 U.S. at 834, whether measured in terms of the economic impact of the designations on Petitioners or by the extent to which the designations have interfered with Petitioners' distinct investment-backed expectations, see Bowen, 483 U.S. at 606.

12.(...continued)
decisionmaking.

13. Petitioners argue that the trial court's failure to hold an evidentiary hearing "precluded evaluation" of whether the designations fulfilled the first prong of the Nollan test. Petition at 5 n.7. This contorted argument is based on the mistaken and wholly unsubstantiated premise that interior landmarks burden theatre productions. See p. 5 n.6 above and pp. 16-17 below. Moreover, after this Court's statements in Penn Central and Nollan, there is no logical or legal basis for the assertion that the landmark designation of historic buildings does not substantially advance historic preservation goals. See Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 357 n. 6 (1990) (Challenged landmark designation substantially advances a legitimate state interest because, "[w]hile land use restrictions must be reviewed in the context of the individual property in question, the same governmental interest held to be valid in Penn Central -- 'preserving structures and areas with special historic, architectural or cultural significance,' (citations omitted) is equally applicable here."), cert. denied, 111 S.Ct. 1103 (1991).

First, there is no concrete evidence of record that Petitioners have actually suffered any diminution in the value of their theatres due to the landmark designations. The theatre owners merely postulate that the interior landmark designations will interfere with their ability to mount productions. They have produced no evidence that any of the designated theatres has suffered any losses in revenue due to the interior designations. Their failure to do so is not surprising because the special Interior Guidelines developed by the Landmarks Commission, with input from a range of theatre professionals, ensure that production-related changes to theatre interiors can be made easily and efficiently, so long as the changes are reversible and meet other reasonable criteria. See pp. 4-6 above; A 11-13, 21-25.

Second, Petitioners have produced no evidence to demonstrate that the landmark designations have interfered with their distinct investment-backed expectations. The landmark designations clearly allow Petitioners to continue to use their properties as theatres, which must be considered to be Petitioners' most reasonable investment-backed expectation. See Penn Central, 438 U.S. at 136 (landmark designation of Grand Central Terminal "does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel" because it "not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years . . . ."). See also Agins, 447 U.S. at 262 (rejecting takings challenge where "[a]lthough the [zoning] ordinances limit development, they neither prevent the best use of appellants' land, nor extinguish a fundamental attribute of

ownership")(citations omitted). The New York Appellate Division properly so found. PA 7a.[14]

Third, as this Court has held, under the Landmarks Law and the New York City Zoning Resolution, "[a]lthough the designation of a landmark and landmark site restricts the owner's control over the parcel, designation also enhances the economic position of the landmark owner in one significant respect": the provision of additional opportunities to transfer development rights that are not accorded to non-landmark buildings. Penn Central, 438 U.S. at 113-14. The significance of development rights is heightened here because several provisions of New York City's Zoning Resolution confer upon landmarked theatres a broader ability to transfer development rights (the air rights above their theatres) than is granted to either nonlandmarked theatres or to other landmarks that are not theatres. See, e.g., New York City Zoning Resolution §§ 81-746, 81-747; see also JA 2901-06. Economic benefit associated with the right to transfer development rights is a relevant factor in considering the economic impact of a challenged land use regulation. Penn Central, 438 U.S. at 137. Here, while Petitioners contended that their ability to transfer development rights is limited, the courts below found that some of the landmarked theatres owned by Petitioners have already made use of these transferable development rights. PA 7a. See also JA 2901-06.

Finally, although the Landmarks Law offers a hardship procedure through which restrictions on a designated

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14. Moreover, nothing in the Landmarks Law prohibits Petitioners from using the theatre buildings for profitable nontheatre uses. For instance, the Landmarks Commission has approved an application to make temporary alterations to a landmarked theatre that will allow the interior of the theatre to be used as a marketing center. JA 2898.

property can be eased or eliminated based on an appropriate showing that the designation denies the owner reasonable economic value, N.Y.C. Admin. Code § 25-309, PA 62a-70a, none of Petitioners has initiated this procedure for any of the theatres whose designation is challenged in this action. In addition to supporting a finding that Petitioners' as-applied challenge is unripe for review, see pp. 18-20 below, the failure to seek available administrative relief undercuts Petitioners' claim that the landmark designations have denied them economically viable use of their property.

B. Petitioners' As-Applied Takings Challenge Is Unripe Because Petitioners Have Not Sought Administrative Relief.

This Court has repeatedly held that an as-applied takings challenge is not ripe for review until the landowner obtains a final determination concerning the application of the challenged regulation to his property and has sought and been denied administrative relief. See, e.g., Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-88 (1985)(as-applied takings challenge to zoning ordinance unripe because owner had not sought and been denied variance); Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264, 297 (1981)(as-applied takings challenge to Surface Mining Act unripe because mine owners had not sought and been denied variances or waivers); see also Yee v. City of Escondido, 60 U.S.L.W. 4301, 4305 (Apr. 1, 1992)(as-applied takings challenge to mobile home rent control ordinance would not be ripe because owners had not sought rent increases)(dicta). Here, the New York Appellate Division correctly determined that Petitioners' as-applied takings challenge was not ripe for

review "in the absence of final agency action on applications by petitioners" for hardship relief. PA 7a.[15]

This Court explained in Williamson that its:

> reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. These factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

473 U.S. at 190-91 (citations omitted). In Williamson, the Court rejected as unripe a property owner's as-applied takings challenge to a zoning board's denial of permission to develop a subdivision because the owner had failed to seek zoning variances, which left "open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances." Id. at 193-94. Thus, the zoning board's "denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property." Id. at 194.

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15. As is discussed above at pp. 13-18, the Appellate Division considered the relevant factors to a takings determination despite its finding that the as-applied challenge was unripe. PA 6a-7a.

Similarly, in this action the theatre owners have failed to seek the administrative hardship relief available under the Landmarks Law, leaving open the possibility that such relief, if sought, would be granted. Thus, landmark designation itself cannot be said to "conclusively determine" whether Petitioners "will be denied all reasonable beneficial use" of their property. Williamson, 473 U.S. at 194. If Petitioners "were to seek administrative relief under [the available hardship] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating the need to address the constitutional questions." Hodel, 452 U.S. at 297.[16]

C. The Fact That No Evidentiary Hearing Was Held Is Irrelevant To Petitioners' Takings Claim.

Petitioners suggest that the fact that the trial court declined to hold an evidentiary hearing nullifies the court's finding that the theatre landmark designations did not effect a taking. Petition at 4-5, 9-10. This argument makes no sense as a matter of fact or law.

First, Petitioners' assertion that the trial court should have held an evidentiary hearing on the economic impact of the landmark designations rings false because Petitioners never requested an evidentiary hearing to present evidence

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16. Petitioners criticize the Appellate Division's finding that the as-applied challenge was unripe, arguing that Penn Central questioned the right of appellants there "to challenge the consequences of designation, as they had not challenged the act of designation when it was made." Petition at 6 n.8. This argument misreads Penn Central. The Penn Central Court merely noted that appellants' facial claim that the landmark designation process was inevitably arbitrary had a "particularly hollow ring" because appellants had never challenged the Grand Central Terminal designation itself as arbitrary. Penn Central, 438 U.S. at 132.

on their Fifth Amendment Takings Clause claims. Petitioners moved for summary judgment on all their claims. PA 13a. During initial oral arguments on the summary judgment cross-motions before the trial court, Petitioners' counsel requested an evidentiary hearing on "the single narrow issue" concerning the procedural method by which the Board of Estimate approved the landmark designations, an issue which Petitioners at that time asserted implicated due process concerns. A 47. The court, upon consideration, determined that this issue should be addressed by amplifying the record through the submission of additional affidavits rather than through an evidentiary hearing. JA 219.

Second, there is no constitutional requirement that an as-applied takings challenge trigger an evidentiary hearing as a matter of law. The "ad hoc, factual inquiries" raised by an as-applied takings challenge, Connolly, 475 U.S. at 224, call for consideration of the factors described above at pp. 11-12. If, however, the record reveals no disputed issue of material fact, summary judgment can and must be granted. Fed. R. Civ. P. 56; N.Y. Civ. Prac. Law § 3212 (McKinney 1991). Here, where Petitioners failed to produce any concrete evidence with regard to either prong of the Nollan standard, and where their as-applied challenge was in fact unripe, summary judgment was appropriately granted.

Finally, it should be noted that Petitioners are arguing, in effect, that the trial court should have held the economic hardship hearing that they themselves failed to seek before the Landmarks Commission under the hardship relief provisions of the Landmarks Law. This attempt to bypass

administrative procedures is improper.[17] Rather, judicial review is only appropriate to consider the agency's final decision based on a full agency factfinding record. See Williamson, 473 U.S. at 186-93.[18]

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17. Petitioners' argument that the trial court should have held an evidentiary hearing on economic impact because the Landmarks Commission did not consider economic impact in designating the theatres is similarly flawed. Under the Landmarks Law, the criteria for landmark designation do not include economic impact. See N.Y.C. Admin. Code § 25-302(n), PA 48a. Economic impact will be considered under the Landmarks Law after designation, if the owner of a designated landmark seeks hardship relief. See N.Y.C. Admin. Code § 25-309, PA 62a-70a. Petitioners cannot properly complain that the landmark designation process did not consider economic impact, when such consideration is precluded by law, and when Petitioners themselves have not sought the hardship relief that is afforded by the Landmarks Law.

18. Petitioners' citations to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), Pension Benefit Guaranty Corp. v. LTV Corp., __ U.S. __, 110 S. Ct. 2668 (1990), and Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), are without avail. The latter two cases explain that when a reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. See Pension Benefit Guaranty Corp., __ U.S. at ___, 110 S. Ct. at 2680; Florida Power & Light Co., 470 U.S. at 744. As the Court explained in Pension Benefit Guaranty Corp., Overton Park stands for the proposition that, under the Administrative Procedure Act, an agency must take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision. __ U.S. at __, 110 S. Ct. at 2680. Here, however, a remand to the Landmarks Commission would serve no purpose because Petitioners have not initiated the hardship proceedings before the Commission that might lead to the necessary factfinding.

POINT TWO

THIS CASE DOES NOT PROVIDE AN APPROPRIATE OCCASION FOR THE COURT TO REVIEW ITS DECISION IN PENN CENTRAL.

While asserting that "no aspect of Penn Central need be called into question" for them to prevail if the Court grants certiorari, Petitioners invite the Court to reconsider its decision in Penn Central or, even more broadly, "the constitutional and logical pinnings of landmark designations in general." Petition at 10. Respondent respectfully urges the Court to decline this open-ended invitation, first, because this case neither requires nor provides an appropriate factual setting for the Court to review its holding in Penn Central, and second, because Penn Central is consistent with the Court's subsequent Takings Clause decisions.

A. This Case Does Not Require Reconsideration of Penn Central Or Provide An Appropriate Setting For Such Reconsideration.

It is well settled that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Hodel, 452 U.S. at 294-95. Here, as Petitioners themselves concede, review of the Court's decision in Penn Central would not be required to determine the merits of Petitioners' claims should a writ of certiorari be granted. The facts of this case, in particular Petitioners' failure to seek hardship relief under the Landmarks Law, which precludes a final determination of the economic impact of the designations on Petitioners, militates against reconsideration of Penn Central. Reconsideration of Penn Central in this context would be especially inappropriate given the breadth of Petitioners' arguments, which may call into question not only the constitutionality of all municipal landmarks statutes, but also,

through the request that this Court determine whether a comprehensive plan is a constitutional requirement for land use regulation, the constitutionality of numerous municipal zoning regulations.

B. Petitioners Offer No Convincing Rationale For Reconsidering Or Overruling Penn Central.

Petitioners offer no reasoned basis for reconsidering or overruling Penn Central. The holding and reasoning in Penn Central have been cited in numerous subsequent Takings Clause decisions by this Court, indicating the Court's continued adherence to its principles and conclusions. See, e.g., Bowen, 483 U.S. at 607; Hodel v. Irving, 481 U.S. 704, 713-14 (1987); Keystone, 480 U.S. at 485; MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986); Connolly, 475 U.S. at 224; Williamson, 473 U.S. at 187; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425-26 (1982); Hodel, 452 U.S. at 296; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980); Agins, 447 U.S. at 260; Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979).

Petitioners nonetheless suggest that Penn Central should be reconsidered because, they assert, landmarking ordinances do not provide "an average reciprocity of advantage" for landmark owners. Petition at 11-12. This argument should be rejected for two reasons. First, contrary to Petitioners' suggestion, this Court has never elevated the concept of "reciprocity of advantage" to a determinative standard for whether a regulation constitutes a taking. At most, the Court has, on certain occasions, considered the presence or absence of "reciprocity of advantage" as a factor that may be relevant to determination of a takings challenge. See, e.g., Hodel v. Irving, 481 U.S. at 715 (Court considers "average reciprocity of advantage" as one of several relevant

factors in determining constitutionality of challenged statute).[19]

Second, Petitioners' argument that the Landmarks Law provides them with burdens but no benefits is incorrect. In Penn Central, this Court rejected the argument that landmarking confers no reciprocity of advantage on the landmark owner:

> In any event, appellants' repeated suggestions that they are solely burdened and unbenefited is factually inaccurate. This contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal -- all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures,

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19. This Court has never squarely based a takings decision on the concept of reciprocity, which was first referred to by Justice Holmes in decisions such as Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In Pennsylvania Coal, Justice Holmes, writing for the Court, found unconstitutional a statute prohibiting underground coal mining that might cause the collapse of certain private structures. Justice Holmes distinguished an earlier case involving a similar statute because that statute "was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws." 260 U.S. at 415. But the Court's actual holding in Pennsylvania Coal was based on the findings that the statute protected private rather than public interests and that it rendered coal mining "commercially impracticable." Id. at 413-14. See Keystone, 480 U.S. at 484 (describing the Pennsylvania Coal holding).

> both economically and by improving the quality of life in the city as a whole -- which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the law, but that must have been true, too, of the property owners in Miller, Hadacheck, Euclid, and Goldblatt.

438 U.S. at 134-35.[20] This determination of reciprocity of advantage applies equally to Petitioners, if not more so. As theatre owners who are in the business of marketing art and culture, they benefit substantially from the Landmarks Law's contribution to New York City's status as a cultural mecca, which attracts potential audiences to the City.

Petitioners further assert that the Landmarks Law violates the Due Process Clause because it does not conform to a comprehensive plan. Petition at 14. Petitioners argue that while the Penn Central Court determined that the Landmarks Law "embodies a comprehensive plan," 438 U.S. at 132, subsequent decisions of the New York Court of Appeals render this conclusion invalid. Petition at 12-13. Petitioners' argument is misplaced for two reasons. First, subsequent decisions of the New York Court of Appeals do not cast any relevant gloss on this Court's decision in Penn Central.

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20. This Court's subsequent decisions have reiterated that the Takings Clause does not require that the benefits and burdens of a regulation be equally balanced. As the Court explained in Keystone, "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491 n.21.

Second, in Penn Central this Court found that, "[i]n contrast to discriminatory zoning, . . . the New York City [Landmarks] [L]aw embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city. . . ." 438 U.S. at 132. In a footnote, the Court recognized that the New York Court of Appeals had "stated at one point that landmark laws do not 'further a general community plan.'" 438 U.S. at 132 n.28 (citation omitted). However, since the New York Court had "also emphasized that the implementation of the objectives of the Landmarks Law constitutes 'an acceptable reason for singling out one particular parcel for different and less favorable treatment,'" this Court did "not understand" the Court of Appeals to disagree with its characterization of the law. Id. No subsequent decision of the New York Court of Appeals calls into question that understanding or otherwise undermines this Court's decision in Penn Central.

Finally, Petitioners' claim that "equal protection limitations" are implicated by the Landmarks Law, see Petition at i, does not withstand scrutiny. With regard to an equal protection claim, the standard is deferential. Respondents need only show that the Landmarks Law is "rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Pennell v. City of San Jose, 485 U.S. 1 (1988). In Pennell, the Court considered an equal protection challenge to a rent control ordinance, in which landlords with low-income tenants argued that they were disparately treated as compared to landlords without such tenants. The Court rejected the argument, stating that:

> In light of our conclusion above that the Ordinance's tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords

> differently on the basis whether or not they have hardship tenants.

485 U.S. at 14. Similarly, since the Landmarks Law serves the legitimate purpose of protecting landmarks, it is hardly irrational for the Landmarks Law to treat certain property owners differently on the basis whether or not their buildings meet the Landmarks Law criteria for designation. Id.[21]

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21. Save the Theatres did not brief in the courts below, and will not discuss here, Petitioners' challenge to the Special Demolition Permit requirement in the New York City Zoning Resolution, see Petition at i (fourth question presented for review).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted

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April 27, 1992

APPENDIX

Affidavit of Jack L. Goldstein,
Sworn to on October 21, 1988
(Appellate Joint Appendix at 5559-81)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

- -x

THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

- -x

Affidavit of
Jack L. Goldstein

State of New York)
County of New York

JACK L. GOLDSTEIN, being duly sworn, deposes and says:

Introduction

1. I am a director of Save the Theatres, Inc., a nonprofit organization comprised of professionals from every creative and technical discipline involved in the Broadway theatre community. Together with Actors' Equity Association, the Society of Stage Directors and Choreographers,

United Scenic Artists Local 829, and the Dramatist Guild, Save the Theatres has moved for leave to file amicus papers in this proceeding because of its integral involvement in the Broadway theatre landmarking process, and its firm and deeply held belief that the individualized, carefully considered landmark designations challenged by the theatre owners are not only proper but essential to the survival of Broadway theatre. I am familiar with all the relevant facts leading to the designations, and submit this affidavit in support of (a) our motion for leave to participate as amici in these proceedings and (b) the challenged landmark designations.

Origin Of Save The Theatres

2. In 1979, the Broadway theatre community was shaken by the planned demolition of the Helen Hayes, Morosco, Bijou, Gaiety and Variety Theatres. These theatres, all built as legitimate Broadway houses, with the first three in active use at the time, were scheduled to be razed in order to build the City-sponsored Portman Hotel project (now the Marriott Marquis). The stated purpose of this project was to contribute to the revitalization of the Broadway Theatre District. In response, the Council of Actors' Equity Association formed the Committee to Save the Theatres to organize the theatre community's efforts to prevent the demolitions, and to bring public attention to the profound loss to Broadway's past and future if the theatres were destroyed.

3. To the vast majority of theatre people -- excluding the major theatre owners and the League of American Theatre Owners and Producers -- the concept of revitalizing the Theatre District by destroying the very theatres which made it a unique national asset was unacceptable and illogical. The Committee sought to convince the City to request a redesign of the hotel which would incorporate into

the new building the three theatres then in use. This solution would have satisfied both the "growth" policy of the City and the legitimate claim of the majority of theatre people and theatregoers to protection of their cultural and aesthetic interests.

4. Despite a spirited and honestly fought campaign, the Committee's efforts failed. The theatres were demolished sequentially during the first half of 1982. The continuing position of the City throughout the long controversy was that while the Committee's "build-over" plan for the theatres had merit, and might have been the optimum solution had it been advanced earlier, the project had proceeded to the point that major design changes were impossible.

5. Determined to avoid such confrontations in the future, the Committee decided that a permanent theatre preservation organization was the best insurance. Save the Theatres was incorporated in October of 1982 as an independent, not-for-profit organization chartered to educate the public, locally and nationally, to the architectural and cultural importance of historic theatres and the art of live theatre which they house.

Composition And Program Of Save The Theatres

6. Although initially established by actors, Save the Theatres has through its policies and programs reflected the fact that theatre is a collaborative art, the success of which depends upon the cooperation of talented people in many disciplines. We continue to speak for a broad-based constituency of theatre professionals, as well as thousands of theatregoers who support and attend Broadway theatre. Our efforts have been encouraged and publicly endorsed by Actors' Equity Association, the Society of Stage Directors and Choreographers, The Dramatists Guild, United Scenic Artists, The American Guild of Musical Artists, The

American Federation of Musicians, and the Theatrical Wardrobe Union; related entertainment unions such as the Screen Actors Guild, the American Federation of Television and Radio Artists, the American Guild of Variety Artists and the Directors Guild of America; and organizations such as the New York State AFL-CIO and the American Federation of Teachers. Save the Theatres has more than 8,500 supporters.

7. The four unions who join Save the Theatres in moving for amicus status represents the thousands of actors, directors, choreographers, designers, playwrights and musical performers who are the individuals who actually create the theatre for which Broadway is world famous. They are collectively responsible for the Broadway theatre's enormous economic contribution both to the City and to the producers of theatre. The theatre professionals represented are informed individuals who know the requirements of their professions extremely well, and wish only to protect the conditions which make it possible to do what they do best, to their benefit and that of many others.

8. Because theatre is a cooperative effort, weakened by division, it has been a major concern of our supporters, and therefore a major goal of Save the Theatres, to heal the serious rift within the theatre community caused by major theatre owners' active support of the demolitions of the Helen Hayes and Morosco Theatres.

9. Then, as now, the theatre owners were the wealthiest and most powerful individual members of the Broadway theatre community, as well as the stewards of its theatres. Their supporting role in the destruction of the Helen Hayes and Morosco was a profound shock to the community at large. The Helen Hayes and Morosco were successful, independently owned competitors of the major theatre owners' houses. We had hoped, however, that the

major theatre-owning organizations would overlook narrow business interests and at least attempt to apply their considerable influence on behalf of the overwhelming concerns of the community. Their failure to do so, while discrediting them in the eyes of their fellow theatre people, has not diminished their vital role in the theatre industry, nor wholly delegitimized their reasonable interests. Therefore, Save the Theatres has been a strong advocate for the owners' concerns as well, when they have been consistent with the greater health of the community and industry to which they are one contributing component.

10. Save the Theatres' initial program for the preservation of the Broadway theatres was to a large extent established by the conditions existing at the time of the demolitions of the five theatres. The following three circumstances contributed most significantly:

a. Because the Helen Hayes and Morosco Theatres were eligible for inclusion on the federal National Register of Historic Places, and the hotel project was in part federally funded (via a HUD Urban Development Action Grant), the federal authorities conditioned ultimate permission to demolish the buildings on mitigating measures which included a case-by-case review of each of the remaining historic Broadway theatres to determine if any was eligible for local or national designation as landmarks. See Record ("R") 1-6.

b. During the height of the demolition controversy, the City began the final public review process for amendments to the Zoning Resolution for Manhattan's west Midtown area. These amendments, which the Board of Estimate adopted in May 1982, permitted for a six year period larger buildings than previously were allowed and in effect targeted the Theatre District for

massive redevelopment. To attempt to defuse the inherent threat to the remaining theatres by this sudden focus of real estate development and appreciation of land values, which the City itself recognized, the amendments included a temporary Special Demolition Permit requirement to prevent forty-four listed Broadway theatres from demolition without prior approval from the City Planning Commission, while the Planning Commission could undertake a comprehensive review of plans for the Theatre Subdistric. These 1982 amendments also conferred on the owners of landmarked theatres expanded opportunities to transfer development rights, and made available certain incentives and bonuses to listed theatres that met specified conditions.

c. The Board of Estimate also directed the Mayor to establish a Theatre Advisory Council to advise the City Planning Commission in developing a plan to ensure the long-term viability of the Broadway theatres. Ellen Burstyn, then President of Actors' Equity Association, was appointed to this Council.

11. All of these factors convinced us that while the City had failed to protect the Helen Hayes and Morosco Theatres, we had made considerable strides in bringing the special qualities and importance of the theatres to its attention. It was apparent that an honest commitment had been made by City Hall to study the matter carefully and to craft a policy in which the theatres could exist side by side with new development in the District. As this systematic examination could only benefit from the theatrical expertise at our disposal, Save the Theatres decided to participate in every aspect of the exhaustive exploration of the cultural, aesthetic, and historical importance of each of the theatres considered for landmark designation.

The Initial Landmarks Hearings

12. After demolition of the Morosco Theatre on March 22, 1982, the City scheduled for June 14 and 15, 1982 public hearings before the City's Landmarks Preservation Commission ("LPC" or "Commission") on the proposed designations of the remaining theatres. In less than three months, with the help of volunteers, Save the Theatres researched from their first opening nights the production histories of each of the 45 calendared theatres,[1] and summarized the architectural features and historic events which made them individually important. These reports were submitted into the record at the hearings. See R 1295-1838. Further, we organized and presented testimony at the hearings, finding theatre professionals -- actors, set designers, playwrights or directors -- with personal experience of a particular theatre to speak before the LPC. Well-known architects were also asked to testify, to inform the LPC of the technology of theatre design, and to explain the relationship among design elements, acoustics, sightlines, audience/stage relationships and decorative schemes, so that the LPC would fully understand the tie between the excellence of these elements found in the Broadway houses and the success of the Broadway theatre experience. Historians, critics and writers were asked to place the theatres within the context of the development of American musical and dramatic theatre, and to describe how the future of those art forms depended on the existence of these spaces which were specifically designed to convey the event of theatre.

13. While the ultimate outcome of the LPC's review was far from assured, all of this testimony was framed so that the LPC could begin to measure each theatre against

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1. Thirty eight theaters were proposed for both exterior and interior designations; seven theaters were proposed for interior designation only.

the specific requirements of the Landmarks Law. Each of the theatres was addressed during the two full days of public hearings on June 14-15, 1982, and hundreds of pages of documentation were introduced into the record for future study by the staff and Commissioners of Landmarks. The record of these hearings remains one of the most thorough documentations of the Broadway theatres extant.

14. At the beginning of the June 1982 hearings, the theatre owners requested that the public record be kept open, claiming they had not had sufficient time to prepare testimony on their individual holdings. Community Board 5, wishing to carry out its own independent and thorough review, made a similar request. We raised no objections, wishing the matter to have the fullest airing.

15. Consequently, the matter was held over for another four months and a subsequent hearing was held on October 19, 1982. By that time Community Board 5 had researched each theatre at length, and supported 65 of the 83 proposed designations. The Community Board's testimony and written submissions at the October hearing were notable in their specificity and depth of research. R 569-1294.

16. At the October 1982 hearing, the theatre owners raised no specific bars to eligibility of any theatre based on the criteria of the landmarks statute, but focused their opposition on what they perceived to be an inherent imposition on their business holdings if landmarks designations were granted. Their testimony was notably brief in comparison to pro-designation comments, particularly considering the weightiness and complexity of the matters involved. Whether the testimony they did offer was germane to the Commission's mandated attempt to gather information on individual theatres in accordance with its responsibility under the law is open to question.

17. With the close of the October 1982 hearing the Commission began its extensive review of the testimony.

The Theatre Advisory Council

18. The Theatre Advisory Council was established by the Mayor in May 1982 as a result of the Midtown zoning amendments. The Council was charged with making recommendations to the City Planning Commission to assist it in developing a comprehensive plan to ensure the long term viability of the Broadway theatres. The Council was comprised of the theatre owners; other representatives of the theatre community, including Ellen Burstyn of Actors' Equity; members of Community Board 5; Save the Theatres board member Barbara Handman; architects; lawyers; a real estate developer; and representatives of the community at large. Ellen Burstyn asked me to serve as her designee to the Council. I have attended every one of its meetings over the past six years.

19. In retrospect, it would have perhaps been wiser of the Mayor to have created a Council on which no theatre person sat, but one made up entirely of disinterested parties to which theatre interests would have been required to make their case. As the Council's activities involved recommendations, particularly those related to zoning benefits, which potentially and ultimately involved financial gain for the theatres as private property, the 50 meetings which led to the Council's report might have been fewer and less stormy if those decisions had been left to others.

20. Not surprisingly, landmarks designation immediately became a source of controversy on the Council. Theatre owners lobbied strongly for a recommendation against designations of any of the theatres, while others, like Ms. Burstyn and Ms. Handman, argued that the Commission, a duly established City agency, should be allowed to carry out

its duty to the public to judge each theatre on its individual merits by the criteria set forth under the Landmarks Law. Disagreement over this issue contributed to a deadlock which prevented the Council from issuing a unified report for two years. Finally, in 1984, I was asked by the Council's chairman to write compromise language for the section of the report dealing with the question of landmarks which would be acceptable to both sides of the argument.

21. The Council's members, including the theatre owners, had agreed at an early meeting that none of their actions or recommendations would undermine existing laws. Working from this guiding principle, I proposed language which recommended that the Landmarks Commission review the theatres independently, according to its standard practices and procedures, free from any interference. That language was adopted by the Council.

22. I further proposed language to the effect that the LPC should carry out its review fully informed of the special nature of theatre architecture, especially in connection with the proposed designation of interiors. This issue deserves some further explanation.

The Theatre Interiors Guidelines

23. Almost from the outset of the City's consideration of landmarks designation for the theatres, theatre owners had raised the concern that interior designations would restrict the creative freedom of set designers and producers in connection with desired changes to the auditoriums of theatres to create a special mood for a play or musical. Owners contended that review of proposed changes under LPC's Certificate of Appropriateness procedures would add time delays and increase the cost of production. This concern continued to be voiced during the Theatre Advisory Council's discussions.

24. As I have mentioned, Save the Theatres's supporters are people who make their livelihood in the theatre, professionals who are fully aware of the complexities involved in mounting shows, and who were therefore very interested in the point being raised by the theatre owners. It was certainly not in anyone's interest to support landmark designation of the theatres if these designations would interfere with productions. The Landmarks Commission also wished to address this concern in a responsible manner, and Save the Theatres therefore arranged for a committee of set and lighting designers to meet with the LPC before the Commission drafted unique operational guidelines to deal with the issue.

25. The guidelines ultimately went well beyond their original intent, dealing not only with temporary production related changes to the interior of theatres, but with state of the art technical changes associated with productions, and even with exterior treatments. The guidelines, drafted specifically for the theatres, were an unprecedented step which provided that any reversible production related changes to the designated interior could be carried out without review by the LPC, so long as the Commission was simply informed by letter that changes were taking place and that the theatre would be returned to a similar state when the show closed.

26. Therefore, even a production as sweeping in its modifications as "Cats," where the entire auditorium of the Winter Garden Theatre was decorated, could proceed in a designated interior with no impediment or review. Similarly, the guidelines provided that state of the art technical changes required by a production could be installed freely, if in a reversible manner, and could even be carried over to an unlimited number of subsequent productions with simple notification to the LPC.

27. The guidelines were an effort on the Commission's part to address a valid concern of the theatre owners that touched upon the greater health of the theatrical community. They were developed in consultation with experts in the field and with the participation of the theatre owners themselves. A public hearing was held on the guidelines, and they were adopted by the LPC on December 10, 1985.

28. We were satisfied that the problem identified by the owners had been fairly resolved and remain convinced that interior landmarks designation, creative freedom, and efficient production schedules are compatible. See accompanying Affidavit of Ming Cho Lee. It is important to note that throughout the entire six year review and landmark designation process, United Scenic Artists has remained firm in its support of interior designation and of the guidelines which its members helped create.

29. Although possible restrictions on creative freedom of set designs was the initial problem identified by the owners, passage of the guidelines had no discernible effect on owner resistance to interior designation. The guidelines, which are a clear guarantee of non-interference in production related and state of the art changes, do require a level of restoration after a production closes. While this does not apply to state of the art installations such as light bridges and sound systems, which can be carried over upon simple notification to an unlimited number of productions, theatre owners have continued to contend that any requirement that a theatre be restored to its approximate appearance will spell financial ruin. This contention is curious at best.

30. Restoration of theatre interiors which have been significantly modified for a particular production is a fact of theatre life, totally unrelated to landmarks designation. Production of any new play in the Winter Garden Theatre, for instance, will require a restoration of the theatre simply

because the "Cats" set is so specific to the play. This cost is normally borne by the producers, not specifically by theatre owners (remembering that there are many other producers on Broadway aside from those who also own theatres). Because the need for post-production restoration is not an issue specifically or solely related to landmarks, the theatre owners' focus on the cost of restoration is misleading.

31. The matter of the theatre owners' consistent objection to landmark designation in the face of unprecedented cooperation by the LPC, City government and the remainder of the theatrical community, comes down, I believe, to objections to simple accountability to an independent authority. Resistance to this on the part of the theatre owners is no different from that of any other property owner. Accountability may be confining, but it is the very crux of the Landmarks Law. When certain buildings achieve a level of overwhelming cultural and architectural importance, some accountability to the public for their preservation is mandated and warranted.

The Initial Landmark Designations

32. While the LPC was examining the record that had been developed during the 1982 hearings, the Theatre Advisory Council was preparing a report summarizing its deliberations and recommendations. The report was approved in June 1984 and published in October 1984.

33. In August 1985, the LPC voted to designate the exterior of the ANTA (Virginia) Theatre, the interior and the exterior of the Alvin (Neil Simon) Theatre and the interior and exterior of the Ambassador Theatre. It voted against the designation of the ANTA interior as failing to meet the criteria for eligibility under the law.

34. The initial designations came before the Board of Estimate in December 1985, after the special guidelines governing interior and exterior production related changes had been officially approved by the LPC. Testimony during public hearings was overwhelmingly in support of designation (save that of the owners and their associates), and the Board of Estimate approved four of the five designations, rejecting the designation of the exterior of the Ambassador Theatre.

35. The Board, however, in responding to the interests of the theatre owners, did agree (despite the recommendation of the Theatre Advisory Council to the contrary) to lift the Special Demolition Permit zoning restriction for any theatre designated a landmark. This was a reasonable action on the part of the Board, which determined that "double-processing" was an unnecessary burden should any owner seek to demolish a theatre, and that the well-tested hardship proceedings under the landmarks statute were sufficient. Language confirming and clarifying the Board's decision was adopted by the Board in October 1987. See Zoning Resolution §81-742.

36. During the December 1985 proceedings before the Board of Estimate, Comptroller Harrison J. Goldin requested that the LPC not bring further theatre designation recommendations to the Board until all the theatres then in use as legitimate houses had been reviewed. While we understood that this request would by definition delay conclusion of the process, we raised no objections to it at the time. One unintentional, though unfortunate, outcome of the request has been that when the LPC finally did bring the remainder of its designation proposals to the Board early during 1988, the fact that so many theatres were found to meet the criteria for designation was misinterpreted by some as evidence of arbitrary, sweeping designations, whereas in fact they resulted from the individual examination of the

theatres which took place during the LPC's executive sessions.[2]

The Remaining Designations

37. Following the initial four designations, the numerous designation reports on theatre interiors and exteriors were compiled. These reports are models of scholarship which will provide a valuable reference for theatre and architectural historians. Although the record on the remaining theatres had been officially closed, because some new Landmarks Commissioners had been appointed, an opportunity for further public testimony was offered in late 1985 or 1986. This provided ample occasion for any new testimony which could be deemed necessary additions to the already considerable documentation at the LPC's disposal.

38. In executive sessions from November 1987 to January 1988, the LPC recommended that of the 75 remaining interior and exterior proposed designations, 26 interiors and 21 exteriors satisfied the applicable criteria. Although the recommendations fell short of our expectations, leaving many theatres unprotected, we accepted the decision of the Commission, understanding that its responsibility was first to the integrity of the Landmarks Law, and that it had exercised that responsibility judiciously.

39. When the remaining proposed designations came before the Board of Estimate for approval on March 10, 1988, they again, despite considerable lobbying by owners, had the support not only of the vast majority of the theatre community but of preservation organizations such as the

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2. In July 1987, the LPC considered separately the proposed designation of the Palace Theater at the request of its owner. LPC voted to designate the Palace interior and this designation was approved by the Board of Estimate in October 1987.

Landmarks Conservancy and the Municipal Arts Society, which monitor and guard the proper application and careful exercise of the Landmarks Law. The Board of Estimate approved the designations that had been recommended by the LPC.

Conclusion

40. As an instrumental player in the long process which led to the designations, Save the Theatres can now look to the situation regarding the future of the Broadway theatres with some assurance. Many are designated landmarks. Expanded opportunities to transfer development rights are available to the owners of those theatres.

41. We can also look back on the long process leading to designation as a responsible and well reasoned exercise of a valuable public statute applied in behalf of the public good. Although we believed that all 83 of the proposed interior and exterior designations were justified, we accepted as of independent value the need for discrete and defensible exercise of the Landmarks Law.

42. Action by the LPC and the Board of Estimate has placed the protective shield of law over many of the theatres and that is the most important outcome of the process. Of the 90 or more theatres that used to comprise the Theatre District, these few are left. Their destruction would not only erase vital chapters of our cultural history but also prevent further theatrical history from being made. See accompanying Affidavit of Colleen Dewhurst.

43. The designated theatres, which cannot be replaced or duplicated by any currently feasible means, are the necessary architectural instruments which allow the complex communication between audience and actor to take place. Without them, the art they contain cannot retain its vitality

or meaning, and Broadway will cease to be the premiere home of theatre in America. That is the eventuality that theatre people have sought to avoid, and why they have, despite the evident difficulties, continued to oppose their major employers in the matter of designation.

44. For all of these reasons, I urge the Court to (a) grant our motion for leave to participate as amici in these proceedings and (b) uphold the challenged landmark designations.

/s/
Jack L. Goldstein

Sworn to before me this
21st day of October, 1988

/s/
Notary Public

Affidavit of Ming Cho Lee,
Sworn to October 21, 1988
(Appellate Joint Appendix at 5588-98)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

- -x

THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

Affidavit of Ming Cho Lee

- -x

State of New York ss.:
County of New York

MING CHO LEE, being duly sworn, deposes and says:

Introduction and Background

1. I am a scenic designer. I have designed sets for more than 20 Broadway shows, including K2, for which I won the Tony, Outer Critics Circle, Drama Desk and

Maharam awards in 1983. Other Broadway shows that I have designed include Mother Courage (1963), Slapstick Tragedy (1966), A Time for Singing (1966), Little Murders (1967), Here's Where I belong (1968), Billy (1969), La Strada (1969), Lolita (1971), Two Gentlemen of Verona (1971), Much Ado About Nothing (1972), The Glass Menagerie (1975 and 1983), For Colored Girls... (1976), Romeo and Juliet (1977), Shadow Box (1977), The Grand Tour (1978), and Execution of Justice (1986).

2. I have designed more than 30 shows at regional theatres including the Arena Stage in Washington, D.C., the Ahmanson Theatre and Mark Taper Forum in Los Angeles, the Guthrie Theatre in Minneapolis, the Long Wharf Theatre in New Haven, The Brooklyn Academy of Music, and the American Shakespeare Theatre in Stratford, Connecticut.

3. I have also designed more than 40 operas for New York City Opera, Metropolitan Opera, Lyric Opera of Chicago, Covent Garden (London), San Francisco Opera, Dallas Civic Opera, and for various other opera companies throughout the United States and Europe.

4. I have designed scenery for more than 20 dance productions by the following companies: American Ballet Theatre, Jose Limon, Martha Graham, Gerald Arpino (Robert Joffrey Company), Alvin Ailey, and Eliot Feld.

5. As principal designer for The New York Shakespeare Festival from 1962-73, I designed more than 40 productions at the Delacorte Theatre in Central Park and at the Public Theatre downtown.

6. I designed the Anspacher and Newman Theatres, which are part of the Public Theatre, and served as an architectural consultant in connection with the construction

of two theatres in Cincinnati and the Performing Arts Center in Purchase, New York.

7. In addition to my designing activities, since 1968 I have taught scenic design at the Yale University School of Drama. I have been co-chairman of the Design Department at Yale since 1979. As part of my responsibilities at Yale, during the last 17 years I have supervised the scenic design of all productions at the Yale Repertory Theatre, which number approximately 14 per year.

8. I was born in 1930 in Shanghai, China, and was naturalized as a United States citizen in 1961.

9. I submit this affidavit in support of (a) the motion of Save the Theatres, Inc., Actors' Equity Association, the Society of Stage Directors and Choreographers, United Scenic Artists Local 829 (of which I am a member), and the Dramatists Guild for leave to participate in these proceedings as amici curiae, and (b) the individual designations of the twenty-two Broadway theatres whose owners have commenced this litigation. Specifically, I am aware that the theatre owners claim that the designation of theatre interiors will create undue delay and difficulty in the production of Broadway shows. I am familiar with the demands of scenic design, and wish to apprise the Court of my professional view that the guidelines governing proposed alteration of a designated theatre interior are both reasonable and essential, and will not prevent or impede in any way the mounting of productions on Broadway. In addition, I wish to set forth the reasons why the landmarking of the theatres in question is necessary to preserve and extend the heritage of theatre art in New York City.

The Interior Guidelines

10. Due to concern that the proposed designations of various Broadway theatre interiors might delay or impede necessary production related changes, the "Guidelines For Treatment of Theatre Interiors" were adopted by the Landmarks Preservation Commission ("LPC") on December 10, 1985. The LPC devised the guidelines after extensive consultation with prominent, practicing scenic and lighting designers. The procedures embodied in the guidelines govern both production related and permanent changes to a designated theatre interior.

a. Production Related Changes

11. The guidelines provide that production related work affecting designated portions of a theatre interior may be undertaken and completed without an application to the LPC if (a) certain conditions are satisfied (see paragraphs 14-17 below) and (b) the owner submits in writing to the LPC a description of the scope of the proposed work and a commitment to return the interior to its prior condition if significant architectural features are proposed to be altered.

12. Submission of a written description of the scope of proposed work is not a difficult requirement for an owner to meet. In most if not all cases, the scope of work, including necessary drawings and specifications, would have to be prepared anyway by the production designer who plans the changes and the contractor who performs the work. Copies simply could be forwarded to the LPC.

13. Nor is the requirement to return the theatre interior to its prior condition especially burdensome. In the event of major interior renovations for a specific production (such as "Cats" or "Starlight Express"), the theatre would have to be returned to its prior condition anyway in order to

accommodate a subsequent incoming production. If the incoming production required a continuation of the initial changes, or new changes, the guidelines permit the owner to postpone restoration of the interior until the close of that production, all without any LPC review. Restoration, of course, is necessary in order to preserve the architectural, aesthetic, or historical character of each of the designated interiors.

14. The four specific conditions that must be satisfied in order for an owner to make production related changes without prior LPC review or approval are reasonable and necessary. First, the interior configuration of the theatre -- its interior geometry -- must be maintained. This is essential in order to preserve the fundamental design of the theatre. The physical relationship between performer and audience is determined by a theatre's interior configuration. It is perhaps the most basic element in determining the nature and quality of the live theatrical experience.

15. The second condition is that any alteration to architectural features highlighted in the Designation Report must be reversible. This is a necessary requirement. Along with the configuration of an interior, architectural features separate great from ordinary theatres. They give the theatre its human scale, adding to the intimacy of the theatrical experience and allowing performer and audience to communicate in the manner that is unique to live theatre. Ornamentation is also crucial to the acoustics of a theatre; when ornamentation is removed the result can be acoustical chaos.

16. The third condition precedent to production related changes without LPC review or approval is that, if a contrasting color scheme is changed to a noncontrasting one, a contrasting scheme must be returned after the production closes. This requirement is necessary because contrasting

colors highlight fragmentation or ornamentation on a theatre surface, making visible high or medium relief. As is the case with changes in interior configuration, the return to a contrasting color scheme is not mandated if a new incoming production requires noncontrasting colors. Moreover, the guidelines impose no restrictions on the actual colors used, mandating only that the contrast, which is necessary to preserve important aesthetic features of the theatre interior, be returned.

17. Finally with regard to production related changes, if a Department of Buildings permit is required for the work, an owner must submit to the LPC an application for a certificate of no effect. However, the guidelines provide that such a certificate "will be issued" by LPC staff within five working days of receipt of a completed application. This is a minimal delay, and since it would occur during the pendency of an application to the Buildings Department it would work no prejudice on a theatre owner or producer. The guidelines mandate that the certificate be granted by the LPC.

18. I understand that the theatre owners claim that interior designation will hinder the scenic designer's creative work. I disagree. In my professional opinion the guidelines that have been adopted by the LPC more than reasonably meet any rational production related concerns, and are essential to preserve the integrity of the designated interiors as live theatre spaces. Furthermore, a scenic designer's job is to design an environment within an existing space. The given geometry of a theatre, and its architectural detail, influence a set designer's vision. They are liberating constraints within which the designer creates. That is the set designer's art.

b. Permanent Alterations

19. Before permanently altering a designated interior, an owner must apply to the LPC. However, the guidelines provide that, within five working days of receipt of a completed application, a certificate of no effect permitting the proposed work "will be issued" by the staff if three conditions are satisfied.

20. The first condition is that the interior configuration of the theatre must be maintained. For the reasons stated in paragraph 14 above, this requirement is essential in order to vindicate the underlying purpose of interior landmarking.

21. The second condition is that the LPC staff must determine that the proposed alteration would not affect significant architectural features highlighted in the Designation Report. For the reasons stated in paragraph 15 above, this requirement also is essential. Special architectural features help to make the interior a landmark; if they are destroyed, then the purpose of landmarking has been lost.

22. Finally, with regard to the installation of state of the art changes such as light bridges or sound booths, the LPC staff must find that their installation will not affect the physical fabric of the significant interior features of the theatre or that such an effect is reversible. This is justified in that any irreversible state of the art installation that will affect the interior should be subject to a permitting procedure under the regulations generally applicable to designated landmarks. On the other hand, reversible changes, or ones that the LPC staff determines will not affect significant interior features, can go forward without prior LPC review or approval.

c. Recourse To Normal LPC Procedures

23. The interior guidelines, which apply solely to designated theatres, ease the way for the theatre owners and producers, affording greater flexibility than otherwise would be available under the Landmarks Law. In this regard I note that for any proposed change in which the conditions prescribed in the guidelines are not met, the normal LPC review and approval procedures are available for an owner who wishes to alter a designated theatre. In light of the integral importance of designating the theatre interiors that the LPC has carefully selected as landmarks, see paragraphs 24-26 below, this seems more than fair.

The Importance of Landmarking

24. A theatre interior is a totality, an environment that physically defines the relationship between performer and audience. Even if not independently outstanding, every detail is part of that environment.

25. The designated Broadway theatres are unique in the world. Elements of their interior design and ornamentation were crafted by hand; we have lost the art of building theatres that way. Interior features give the theatre its human scale, which in turn permits the intimate communication vital to live theatre.

26. There is a continuity in the theatre art that originates in the past. In part it is contained in the designated theatres themselves. Urban society, and theatre itself, demand a sense of history. In this way, the live theatre differs fundamentally from video or other forms of contemporary entertainment. Everything in the live theatre is custom-made. It exists on a human scale. It is that essential sympathy, established within the physical world of the theatre interior, that provides the opportunity for

connection between audience and performer, and between our present and our past.

27. For the foregoing reasons, I support the landmark designations of each of the twenty-two Broadway theatres owned by the petitioners, and urge the Court to (a) grant our motion for leave to participate in these proceedings as amici and (b) uphold the challenged designations.

/s/
MING CHO LEE

Sworn to before me this
21st day of October, 1988

/s/
Notary Public

Affidavit of Colleen Dewhurst,
Sworn to on October 20, 1988
(Appellate Joint Appendix at 5582-87)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK :
IAS PART 35

- -x

THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

- -x

Affidavit of Colleen Dewhurst

State of New York ss.:
County of New York

COLLEEN DEWHURST, being duly sworn, deposes and says:

1. I am an actress. On Broadway I have performed in many plays, including A Moon For The Misbegotten (Tony Award), All the Way Home (Tony Award), You Can't Take

It With You, Mourning Becomes Electra, An Almost Perfect Person, Who's Afraid Of Virginia Woolf (revival; Tony Nomination), The Ballad Of The Sad Cafe, The Good Woman Of Setzuan, Tamberlaine the Great, and, most recently, Long Day's Journey Into Night and Ah! Wilderness.

2. I have also performed in films (including When A Stranger Calls, Tribute, and Annie Hall), and on television (for which I have received the Emmy and Gemini awards).

3. In June 1985, I was elected President of Actors' Equity Association, the union of all professional performers and stage managers in the legitimate theatre in the United States. Equity has 39,000 members. I am Equity's 11th president, and the second woman to hold that office since the Union was founded in 1913. I have served on Equity's Governing Council since 1983.

4. Among my other activities, I am a member of the Executive Board of the Actors' Fund of America, the Board of Directors of the American Council for the Arts, and the Policy Overview Panel and the Theatre Program Panel of the National Endowment for the Arts.

5. The Morosco Theatre was demolished in 1982, along with the Helen Hayes and three other legitimate houses. At that time, actors and other theatre professionals joined together to find a way to protect our shared heritage, so that we could help pass it along to our children. That is how Save the Theatres was born.

6. Since its inception, I have been on the Board of Directors of Save the Theatres, and I now serve as its Vice-Chair. I testified during hearings before the Landmarks Preservation Commission concerning the proposed designation of various Broadway theatres.

7. I submit this affidavit to express and explain to the Court the extraordinary importance to actors of sustaining the careful landmark designations that have been made by the City. I write as an actress, as President of Actors' Equity, and as an individual who has been involved integrally in the effort to ensure and advance our collective theatrical heritage.

8. The designated theatres are important to the actor's craft. They embody an emotional value which is essential to the quality of our work. All actors work within the tradition of acting, and it is to that tradition to which we turn, always and consistently in our professional life, as the measure of our performance. It is the excellence of that tradition to which we aspire and to which we are responsible. Acting is by definition an internal process in which emotion is the central material with which we work. Each of the designated theatres possesses its own personality, is an instrument that helps to give us voice.

9. One of my most distinct memories as an actress is performing in Eugene O'Neill's Moon For The Misbegotten at the Morosco Theatre in 1973. We had been out of town in Lake Forest, Illinois, and Washington, D.C. before we came to Broadway. We did not expect the show to succeed in New York. I remember the plaque on a door of the Morosco saying that O'Neill's first Pulitzer Prize winning play had been presented there. It made a difference. When I walked out onto that stage, I felt that it was populated by the great actors who had walked the boards before me. It inspired me, because of the history of the place, the continuity in the theatrical process that I was helping to maintain and extend.

10. Each of the other historic Broadway theatres functions in this way, making its own demands on the quality of our performance. The old Broadway houses welcome an

actor. They are our homes. Our teachers walked the boards. Our parents sat in the audience. Preserving and advancing this heritage is a debt we owe to our children. The designated theatres may be privately owned, but they belong to all of us.

11. These feelings are not merely magical. The acoustics in the old Broadway houses, the sight lines, their configurations and decor, enable the actor immediately and intimately to make contact with the audience. That is the crucial element in our art. The old Broadway houses were built with deep, implicit respect for the importance of that principle: contact among people. They were built by architects who could translate that principle into spaces of exquisite technology. Many new theatres, like the one that was built to replace the Hayes and Morosco, are antiseptic, a quality that discourages or kills the possibility for intimate communication between performer and audience. Theatre is a shared experience and the integrity of the physical space in which that connection takes place is critical to its survival.

12. At the moment of performance, the actor is the central element in the event of theatre. The work of playwrights, set designers, directors and choreographers contributes to the live communication between performer and audience. The designated theatres also, by the genius of their architecture, collaborate with us, by permitting and encouraging the experience we work to create. It is because they are so extraordinary in their architectural qualities that American theatre was born and grew up in them. It is that tradition that we wish to carry on.

13. Our landmarked theatres are the cultural heart of this City. The careful, individualized designations of the twenty-two theatres at issue in this proceeding are a clear and hopeful recognition of the historical, aesthetic value of

live theatre to New York and to the world. Actors' Equity and I applaud them.

14. For these reasons, I urge the Court a) to grant our motion for leave to participate as amici in these proceedings and b) to uphold the challenged landmark designations.

/s/
COLLEEN DEWHURST

Sworn to before me this
20th day of October, 1988

/s/
Notary Public

Affidavit of Jack L. Goldstein
(Sworn to April 5, 1989)
(Appellate Joint Appendix at 2917-33)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK:
IAS PART 35

- -x

THE SHUBERT ORGANIZATION, Inc., et al.,

Petitioners-Plaintiffs,

-against-

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents-Defendants.

- -x

Affidavit of Jack L. Goldstein

State of New York)
County of New York

JACK L. GOLDSTEIN, being duly sworn, deposes and says:

Introduction

1. I am a director of Save the Theatres, an amicus and proposed intervenor in this proceeding. I am fully familiar

with the facts and prior proceedings, and submit this affidavit to counter the claim now advanced by the petitioners (or "owners") that the absence of a verbatim transcript of the public hearings conducted by the Landmarks Preservation Commission (the "Commission" or "LPC") on June 14-15 and October 19, 1982 invalidated the theatre designations recommended by the Commission and approved by the Board of Estimate in 1988.

2. I was present during all three days of hearings before the Commission in 1982. I was also integrally involved in the long administrative process that followed those hearings, up through final Board of Estimate approval of various landmark designations in March 1988.

3. Petitioners contend that because of the absence of a verbatim transcript of the three days of public hearings held in 1982, and because a substantial number of the Landmarks Commissioners present at those hearings had been replaced by the time of the final Commission votes in 1987 and 1988, the Commission did not consider the information or views presented by the owners at the original hearings. The extensive written record, numbering more than 6000 pages, upon which the Commission based its final designation decisions, demonstrates the preposterous nature of the petitioners' claim.

4. In fact, as I set forth fully below, <u>every</u> substantive argument advanced by the theatre owners during the 1982 hearings is fully reflected in the written record on which the Commission and Board of Estimate based their designation decisions.

5. The substance of the theatre owners' brief and generalized testimony before the Landmarks Commission on June 14, 1982 and October 19, 1982 (the theatre owners did not testify on June 15, 1982) is reflected in the record in (a)

the written summaries of each speaker's testimony at the hearings; (b) the architectural report on the theatres proposed for designation that was commissioned by the theatre owners and submitted to the Commission on their behalf; (c) the verbatim transcript of the additional public hearing held in December 1985 before the Commission; (d) the evidence of correspondence and personal meetings between the Commission and the theatre owners; and (e) the verbatim transcript of the March 1988 hearing before the Board of Estimate.

Each of the Substantive Points Made in the Owners' Testimony During the 1982 Hearings is Contained in the Administrative Record.

6. I was present throughout the three days of LPC hearings held on June 14-15 and October 19, 1982. I have also reviewed the verbatim transcript of the 1982 hearings which was recently prepared by the City and submitted to the Court. My review confirms that each substantive point raised by the owners or their representatives through oral hearing testimony appears in writing elsewhere in the record that was available to and reviewed the Landmarks Commission and Board of Estimate members who ultimately recommended and approved the theatre designations that petitioners now challenge. In the subparagraphs below, I summarize the five essential points made in the owners' oral hearing testimony, citing to the recently submitted volumes (XXXIV-XXIX) of the administrative record ("R") and then referring the Court to pages in earlier volumes of the record in which those views are expressed.

a. Owners need a comprehensive relief package, including freer transfer of air rights and tax abatements; landmarking alone will undermine not

enhance preservation of theatres. Gerald Schoenfeld, R 6570-74, 6578, 6588 ("these theatres are pieces of economic real estate")(June 14); John Zuccotti (for Nederlanders, Jujamcyn), R 6606 (June 14); Robert Nederlander, R 6627, 6631 (June 14), R 7376-77 (October 19); Richard Wolff, R 6636 (June 14); plus Paul Libin (Managing Director, Circle in the Square), R 6642-43 (June 14); and William G. Mallon (Vice President, Chemical Bank), R 6645 (June 14).

The substance of this argument appears in the record at 2502-03 (summary minutes of June 14 hearing testimony of Gerald Schoenfeld), 2502-2503 (summary minutes of June 14 hearing testimony of Robert Nederlander), 2503 (summary minutes of June 14 hearing testimony of Richard Wolff), 2516 (summary minutes of October 19 hearing testimony of Robert Nederlander); 1848, 1867, 1889 (from "Thirty Theatres," a report submitted by the owners' consultant Hugh Hardy (hereinafter "Hardy Report")), 2484 (letter from Gerald Schoenfeld to Mayor Koch, dated September 18, 1985). It should be noted that Kent Barwick, then Chairman of the LPC, who presided over the 1982 hearings, correctly pointed out that such economic considerations were beyond the purview of the Commission, which was considering the architectural, historical, cultural, and aesthetic merit of each building proposed for landmark designation, R 6555 (June 14); R 6839-40 (June 15); R 7375-76 (October 19).

b. Landmarking theatre interiors will inhibit owners' ability to accommodate in a timely fashion the needs of a new production and to install state-of-the-art technology. Mr. Schoenfeld, R 6591

(June 14), R 7211-12, 7343-44, 7351, 7364 (October 19); Mr. Nederlander, R 7379 (October 19); Mr. Wolff, R 7387-88 (October 19); Hugh Hardy, R 7391-93 (October 19); Robert McDonald (Stagehands Union), R 7258-60 (October 19)(no position regarding designation, merely expressing concern).

The substance of this testimony appears in the record at 1294 (October 5, 1982 testimony of Hildy Parks Cohen, member of Landmarks Committee of Community Board 5, to Landmarks & Cultural Affairs Committee); 2516 (summary of October 19, 1982 hearing testimony of Robert McDonald); 1844 (Hardy Report, stating that technology in the theatres is "outmoded"); 2926, 2934 (verbatim testimony of Gerald Schoenfeld at December 10, 1985 hearing before LPC).

c. Adjourn June hearings until October to give owners the opportunity to gather and present information regarding theatres proposed for designation. Mr. Schoenfeld, R 6576 (June 14); Mr. Zuccotti, R 6609, 6610-11 (June 14); Mr. Nederlander, R 6632-33 (June 14); Mr. Wolff, R 6635 (June 14).

The substance of this testimony appears in the record at 2502-03 (summary of June 14 hearing testimony of Gerald Schoenfeld); 2503 (summary of June 14 hearing testimony of John Zuccotti); 2503 (summary of June 14 hearing testimony of Robert Nederlander); 2503 (summary of June 14 hearing testimony of Richard Wolff). At the owners' request, the hearing was continued until October 19, 1982.

d. Keep record open after October hearing to give Mr. Hardy the opportunity to complete his report on 30 theatres proposed for designation. Mr. Schoenfeld, R 7210 (October 19)("so that we...will have a complete opportunity to be heard and a full record made for your consideration"); Victor Marrero (for Nederlanders, Jujamcyn), R 7255-56, 7430 (October 19); Mr. Nederlander, R 7372-73, 7376 (October 19); Mr. Wolff, R 7381 (October 19).

The substance of this testimony appears in the record at 2515 (summary of October 19 hearing testimony of Gerald Schoenfeld); 2516 (summary of October 19 hearing testimony of Richard Wolff). The record was kept open after the October 19 hearing, in order to allow Mr. Hardy to complete his report. Mr. Hardy's report, prepared at the behest of the owners, consumes 226 pages of the Commission record, R 1839-2065.

e. Consider designations on theatre by theatre basis. Mr. Schoenfeld, R 6575 (June 14).
The substance of this testimony appears in the record at 2503 (summary of June 14 hearing testimony of Gerald Schoenfeld). The Commission did consider each theatre building individually as is evidenced by the careful, extensive, individual designation reports prepared by LPC staff. R at Volumes XXIV through XXX.

7. Even minuscule elements of the owners' oral testimony during the 1982 hearings are contained elsewhere in the administrative record. For example, the Hardy Report contains a reference to the "light fixtures with colored glass" in the Belasco Theatre, R 1910. Mr. Schoenfeld had discussed these during the October 19 hearing, R 7352.

8. Mr. Hardy's report also includes a reference to the suspended lighting bridge that compromises the integrity of the Shubert Theatre ceiling design, R 1988. So does the Commission's own designation report for the Shubert Theatre, R 6079. Mr. Schoenfeld had mentioned this during the October 19 hearing, R 7357.

9. The Hardy Report rates the public space, including the adequacy of the lounge and restroom facilities, in each of the 30 theatres it considered, see, e.g., R 1910 (Belasco Theatre), 1955 (Majestic Theatre); see also R 2933 (verbatim transcript of December 10, 1985 hearing testimony of Mr. Schoenfeld, arguing that theatre lounges, lobbies and dressing areas should not be designated as landmarks). Mr. Schoenfeld had mentioned this during his October 1982 oral testimony, R 7365.

10. Thus, a review of the verbatim transcripts of the 1982 public hearings reveals that the substance of the owners' testimony is amply and repeatedly covered in the record that formed the basis for the Commission's and Board of Estimate's judgments on the proposed theatre designations.

The 1982 Hearing Transcripts Support the City's Decision to Designate Petitioners' Theatres.

11. The 1982 hearing transcripts are illuminating in other ways. First, there was a groundswell of public support expressed for the designations. The theatre owners, real estate powers of the theatrical business, were virtually alone in opposing designation. Literally hundreds of individuals, and organizations representing tens of thousands of New

Yorkers, testified in favor of landmarking. See, e.g., R 6989-7145 (June 15); R 7471-7531 (October 19).

12. Moreover, in contrast to the owners' generalized testimony, the proponents' support was substantive and to the point. Thus, in June 1982 those supporting designation submitted full and thorough documentation regarding each theatre's eligibility under the architectural and cultural criteria for designation. Oral testimony by the 75 speakers, all of whom were clearly recognized as responsible and, in many cases, renowned members of the theatre community were also recorded through the submission of written statements to the LPC. R 1295-1838. Review of this portion of the record will illustrate to the Court the depth and specificity of the proponents' research.

13. In stark contrast, the testimony presented by the owners at the June 1982 hearings was general comment, essentially negative to the process of landmarks designation. The owners did not conform their public remarks to the purpose of the Landmarks hearings, which was to elicit specific, informed opinion related to the individual characteristics of specific buildings under consideration for designation.

14. During the October 19 hearing the exhaustive report by Community Board 5 was submitted to the Commission. R 569-1294. This report supported 65 of the 83 proposed designations. The owners, however, offered essentially the same testimony as they had presented in June, and in light of the paucity of relevant information proffered by the petitioners regarding the individual eligibility of specific theatres, their comments were summarized for the record in a manner consistent with their utility. R 2515-16.

15. This is not to say that the general opposition of the owners to the process of Landmarks designation of their

properties was discounted, but rather to say that the matters of tax abatement and transfer of air rights -- which were the focus of the owners' testimony -- were not then (or ever) within the legal purview of the Commission, nor factors upon which the LPC could or should judge the architectural or cultural merits of the buildings under consideration.

The Hardy Report, Prepared for the Owners, Was Fully Considered by the City.

16. The key substantive submission to the LPC by the theatre owners was the Hardy Report, to which I referred above in paragraphs 6-9. This report, over 200 pages long, was submitted to the LPC on April 22, 1983 on behalf of the petitioners and concluded that "taken as a whole these 30 buildings are economically culturally and physically irreplaceable" although "the appropriateness of the Landmark designation for these structures should be considered in light of what it would mean to the design review process of the Landmarks Commission and to the development mandated by the City in the Theatre District." R 1845.

17. This study was specifically commissioned by the petitioners and represents their most thorough testimony on the individual qualities of their theatres. While it finds that the theatres evidently meet the criteria for designation under the law, the owners contended that such criteria, or at least the conclusion which must logically flow from applying these criteria, should be ignored or adjusted due to factors outside the ambit of the Landmarks Law.

18. Further elements of the Hardy Report are worthy of mention. First, Mr. Hardy rates every one of the 30 theatres he studied within the "A" (highest) range with

regard to the five factors that he considered relevant for consideration by the Commission. R 1899-1900.

19. Second, Mr. Hardy lists the theatres alphabetically, R 1893, a practice that petitioners' lawyers have decried in this litigation. Mr. Hardy's method tends to support the orderly, nonarbitrary method adopted by both the LPC, see, e.g., R 3394 (official transcript of November 4, 1987 Executive Session), and the Board of Estimate.

The December 1985 Hearings, Which Were Transcribed Verbatim in the Administrative Record, Provided The Owners With An Additional Opportunity To Be Heard.

20. On December 10, 1985 a duly advertised additional LPC public hearing was held to discuss the issue of the special guidelines developed by the LPC in its efforts to be responsive to concerns regarding any potential interference in the smooth production of legitimate plays in theatres which might ultimately be designated Landmarks. It was in the discussions leading up to the development of these guidelines, for instance, that backstage areas were excluded from review by the Commission and that an unprecedented series of beneficial and expedited review procedures freeing temporary production-related and many semipermanent state-of-the-art technological installations from Commission approval were crafted. An official transcript of this hearing is included in the record at 2917-3008. Of the petitioners, Gerald Schoenfeld testified at length about a broad range of issues, R 2924-2935, as did Robert Nederlander and Richard Wolff. All expressed their concerns about the guidelines while all other speakers were substantially in favor.

21. Gerald Schoenfeld himself lauded the Commission's openness, specifically regarding the controversial guidelines

governing designated theatre interiors. During his December 10, 1985 testimony regarding the proposed guidelines, Mr. Schoenfeld, who heads the powerful petitioner Shubert Organization, expressly thanked the LPC for its time, stating for the record:

> Commissioner Norman, members of the Commission, initially I would like to -- I would really like to express my appreciation to the Commissioner and the staff for the time that they have spent with us in developing these guidelines. I think that the time has been productively spent. R 2924.

This statement reflects accurately the open, thorough attention paid by the Commission to the owners' views throughout the administrative process.

During 1985-1988 the Owners and the City Engaged in an Ongoing Dialogue That Included Petitioners' Participation In the Commission's Executive Sessions.

22. Both the petitioners and the proponents of designation engaged in an extensive ongoing dialogue with the Commission on all pertinent issues throughout the LPC's exhaustive review of the eligibility of each theatre.

23. For example, Mr. Hardy and I issued a 25-page report in March 1987 proposing revisions in the method by which designation reports were drafted. The purpose of the report was educational; it explicitly was not a document favoring or disfavoring designation of any particular theatre. After extensive interchange, the Commission decided not to accept our recommendations. The LPC's decision does not obscure, however, the fact that for nearly a year the

Commission participated in an open exchange of views on this matter. I myself attended meetings with the Commission on this subject on May 22, June 4, July 30, October 15 and October 29 of 1987. On this issue the owners and I were in substantive accord, and while I disagreed with its ultimate decision I respected the openness and thoroughness of the Commission's review, which was characteristic of the fair process it provided throughout the lengthy administrative proceedings.

24. The record also reveals that the owners corresponded frequently with the Commission, expressing their views on a range of procedural and substantive matters, R 2476 (Mr. Schoenfeld to Chairman Norman, dated September 12, 1985), 2478 (owners' representative Ethan Geto to Chairman Norman, dated August 12, 1985), 2493 (Mr. Geto to Chairman Norman, dated December 17, 1986).

25. Following all public hearings and the continuing dialogue described above, the Commission began an exhaustive series of 29 Executive Sessions to consider the proposed theatre designations. The transcripts and minutes of these Executive Sessions, as well as the meetings and written communications between the LPC and the owners during this period of time, reflect the cognizance of the Commissioners of the full range of opinions expressed at all public hearings and show not only the serious consideration given to each individual theatre as prescribed by law but also the Commission's specific concern for the petitioners' views.

26. The record reveals a painstaking, fair administrative process, during which the theatre owners were accorded -- and pursued -- full access to government decisionmakers. In this regard, the record reflects, for example, that the owners or their representatives attended critical Executive Sessions of the Commission, R 2481 (letter from LPC Chairman Gene Norman to Mr. Geto, dated

August 27, 1985), and met on other occasions with LPC Commissioners and staff, R 2468 (letter from LPC Chairman Norman to Mr. Schoenfeld, dated August 19, 1984) and 2473 (letter from Mr. Schoenfeld to Chairman Norman, dated August 1, 1985, expressing appreciation for a meeting with Mr. Norman and his staff regarding the proposed theatre designations).

27. Finally, the transcript of the Executive Sessions, particularly the intensive long sessions that occurred during the months proceeding the final vote in 1988, show that through staff presentations, slides and personal visits to theatres the Commissioners who made the decisions were fully informed of the diversity of views which had been expressed throughout the long review process. Both by dint of the written record, including that of the original hearings which clearly show that the viewpoint of the petitioners at the beginning of the process remained essentially unchanged, and by the benefit of personal and lengthy contact with the petitioners and their representatives, as well as those who supported designations, those Commissioners who voted in 1988 were fully aware and had concluded by their own careful analysis and judgement which of the theatres under consideration were worthy of designation and which were not.

Prior To Approving the Designations the Board of Estimate Heard Further Testimony From the Owners.

28. The Board of Estimate's final confirmation of the Commission's exhaustive study and recommendations was based on a comprehensive designation report prepared by the LPC for each proposed designated theatre, R at Volumes XXII-XXX, as well as an extensive public hearing on March 10, 1988 at which more than 50 people testified,

R 6167-6353. Although the overwhelming majority spoke in favor of the designations, the Board of Estimate was able to consider the views of those few speakers who chose to attend the hearing, including the owners, and speak out against the designations. The owners (as well as the Executive Director of the League of American Theatres and Producers, a petitioner in this proceeding) testified at length and in detail before the Board of Estimate, R 6171-6209. The Board of Estimate also closely questioned Chairman Norman about the designations and the operational guidelines after the public testimony had ended, and only after long hours of consideration voted to support both the Commission and the overwhelming wishes of the public to designate the theatres.

Summary

29. In sum, the owners' contention that the Commissioners who voted in 1988 were unaware of their viewpoint and that the absence of a full transcription of the original hearing constitutes a flaw in the process is refuted by the record. The Commission fully considered the owners' views. Moreover, at no time during their oral testimony did petitioners address the substance of the criteria which circumscribed the Commission's authority but rather expressed a near global objection to designation for reasons unrelated to the Landmarks Law. The essence of the owners' argument persists to this day in this litigation: designation will financially undermine the theatre business. The owners' unsubstantiated, self-serving claim that the purpose of the Landmarks Law should be subverted or diluted for their personal profit is as unacceptable now as it was in 1982. In point of fact, the owners' arguments failed at the Commission and at the Board of Estimate not because they were excluded from the record or withheld but because they lacked merit.

30. For the reasons set forth above, in our previous affidavits and in our memoranda of law, I urge the Court to reject the owners' claims and to uphold the designations that emerged from the City's fair, thorough, open administrative review.

/s/
Jack L. Goldstein

Sworn to before me this
5th day of April, 1989

/s/
Notary Public

Excerpt from Transcript of Proceedings Before
New York Supreme Court, New York County
April 6, 1989
(Appellate Joint Appendix at 212-13)

MR. ALTER: I understood your Honor's view that with respect to the limited process employed by the Landmarks Commission and the Board of Estimate that it is your Honor's view that it may not be evidenciary [sic] hearing exploring this deliberative process.

However, the issue we are talking about now and the issue which your Honor says she wanted amplification had to do with simply the question of the procedure for communicating the record from the Landmarks Commission to the Board of Estimate and for placing that matter before the Landmarks Commission. That as I understand it your Honor, is a factual issue which your Honor had rightfully felt had constitutional overtones in which your Honor wanted to resolve.

* * *

Accordingly, and I might say, your Honor, that it comes rather late after these many months for the City to come forward and say let's not have this amplification. Let us give you this expert submission. So your Honor, I really believe that we ought not to depart from what had I had thought had been the original proposal in Court.

Namely that on that single narrow issue there be presented to the Court evidence and the opportunity for petitioners to cross examine the proof and the witnesses on that single issue.

Excerpt from Transcript of Proceedings Before
New York City Landmarks Preservation Commission
June 17, 1986
(Appellate Joint Appendix at 2397)

From an architectural point of view the theaters are no great shakes, but we are not here to talk about them as architectural because if they were, I would have to maintain the same position: They are no great shakes.

We are here to -- we have to recognize that theaters are part of the history of New York and also that their physical quality makes them part of the history of New York.

Their physical quality that draws people to them, that causes people to act well in them and to be heard and to be responded to and to be either acclaimed or panned by the critics the next day.

This is all part of the culture. So where does one draw the line?

Supreme Court, U.S.
FILED
APR 27 1992
OFFICE OF THE CLERK

No. 91-1382

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., et al.,

Petitioners,

-against-

THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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April 24, 1992

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Is a claim that designation of certain Broadway theatres as Landmarks violates the Takings Clause of the Fifth Amendment premature, where petitioners failed to utilize any of the provisions of New York City's Landmarks Law permitting a property owner to seek authorization to alter or even demolish a landmarked structure on grounds which include economic hardship?

2. Was the New York City Landmarks Commission authorized to designate certain Broadway theatres as landmarks, where this Court specifically upheld the constitutionality of the New York City's Landmarks Law in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), and then reaffirmed that holding nine years later in

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)?

3. Does the "special demolition permit" requirement of New York City's Zoning Regulation unconstitutionally discriminate against theatre owners subject to its provisions?

LIST OF PARTIES

Respondents accept the list of parties provided by petitioners.

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POINT ONE

SINCE PETITIONERS FAILED TO MAKE USE OF THE STATUTORY MECHANISMS DESIGNED TO RELIEVE A PROPERTY OWNER FROM ECONOMIC HARDSHIP ALLEGEDLY CAUSED BY DESIGNATION OF A BUILDING AS A LANDMARK, THE APPELLATE DIVISION PROPERLY HELD THAT PETITIONERS' CONSTITUTIONAL CLAIMS WERE PREMATURE. 26

POINT TWO

SINCE THIS COURT SPECIFICALLY UPHELD THE CONSTITUTIONALITY OF THE LANDMARKS LAW IN PENN CENTRAL, AND THEN REAFFIRMED THAT HOLDING IN NOLLAN, THE NEW YORK COURTS PROPERLY HELD THAT THE NEW YORK CITY LANDMARKS COMMISSION WAS AUTHORIZED TO DESIGNATE CERTAIN BROADWAY THEATRES AS LANDMARKS. 32

POINT THREE

THE APPELLATE DIVISION PROPERLY HELD THAT THE ZONING RESOLUTION'S "SPECIAL DEMOLITION PERMIT" DID NOT CONSTITUTE REVERSE SPOT-ZONING. 37

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No. 91-1382

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE SHUBERT ORGANIZATION, INC., et al.,

Petitioners,

-against-

THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

(1)

The Landmarks Law and the Designation of Certain Theatres as Landmarks

Pursuant to New York City Charter § 3020 and New York City Administrative Code §§ 25-301 et seq., commonly referred

to as the "Landmarks Law," a building may be designated a Landmark if it is at least thirty years old and "has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state, and nation...." Landmarks Law § 25-302(n). These criteria also apply to the interiors of structures, which may be designated, in whole or in part, as Interior Landmarks, as long as the spaces in question are "customarily open or accessible to the public, or to which the public is customarily invited...." Landmarks Law § 25-302(m).

A permit mechanism is available for owners of designated buildings who wish to alter or to demolish a landmarked structure. This includes a certificate of appropriateness issued on the ground of insufficient economic return. See, Landmarks Law §§ 25-306, 25-307, 25-309.

As early as 1978, as a result of a memorandum of agreement with the federal Advisory Council on Historic Preservation entered into pursuant to 16 U.S.C. § 470(f), the New York City Landmarks Preservation Commission (the "Landmarks Commission" or "Commission") had begun considering the possibility that various Broadway theatres might be worthy of Landmark status (A3084).[1] Thereafter, a preliminary study identified thirty-five such theatres, including the twenty-two whose designations are contested here (A3084). Ten more

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix filed with the Appellate Division of the New York State Supreme Court. The letter "R" precedes references to pages in the original record of the proceedings before the Landmarks Commission submitted to the Appellate Division but not included in the Appendix. References to the Appendix to the instant petition consist of the page number followed by an uncapitalized "a."

structures had been identified by April 13, 1982, when the Commission voted to calendar public hearings to consider the designation of forty-five Broadway theatres as Landmarks (R8-9).

Two days of public hearings took place on June 14 and 15, 1982; a third public hearing was scheduled for October 19, 1982, in order to permit preparation by various interested parties, including petitioners, of reports and other materials relating to the historical, cultural, and architectural significance of the theatres under consideration (A3086). After the October 19, 1982 public hearing, the record was left open for the submission of additional materials (A2756). The instant petitioners not only testified at the hearings, but, on April 22, 1983, submitted an extensive report prepared at their request by an architectural firm (A3088-3089). The

Commission then held a series of twenty-nine public executive sessions, commencing on April 21, 1984 and continuing through January 5, 1988 (A3091-3092).

The Commission continued to receive voluminous materials throughout this period, including a second report commissioned by petitioners and issued on March 16, 1987 (A3114). Commission staff members also prepared extensive 35- to 40-page designation reports for each building under consideration, detailing the architectural and production history of each individual theatre as well as the common history of the Broadway stage. See, e.g., A297-391, A371-445.

On August 6, 1985, the Landmarks Commission voted to designate the exterior and/or interior of three theatres as Landmarks (A3092). During its consideration of these designations on

December 19, 1985, the Board of Estimate requested that any future designations be presented to it at one time, rather than in a piecemeal fashion (A3092-3093).[2]

After the three August 1985 designations, determinations with respect to the remaining theatres under consideration were postponed by the Landmarks Commission, at the request of petitioners, pending issuance by the Commission of proposed Guidelines designed to facilitate any changes in the exteriors and interiors of Landmark theatres later considered necessary by the owners for production or other purposes (A3093, A3118-3125). These Guidelines were adopted by the Landmarks

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[2] Pursuant to Landmarks Law §25-303, the Board of Estimate, at the time the designations at issue here were made, had the power to modify or disapprove the actions of the Landmarks Commission.

Commission, after a public hearing, on December 10, 1985 (A3118).[3]

Between November 4, 1987 and January 5, 1988, the Landmarks Commission designated the interior and exterior of nineteen theatres, the interior only of seven theatres, and the exterior only of two theatres (A3095-3097). Thirteen theatres were not designated (A3097). Twenty-two of the twenty-eight designated theatres, as well as a number of the thirteen non-designated theatres, are owned by petitioners (A3097). Within five days of each designation, the Commission filed the designation reports for the theatres with the Board of Estimate (A3097), which then, pursuant to Landmarks

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[3] Despite their formal adoption, it is apparently these Guidelines to which petitioners refer in footnote 5 of the instant petition, where they inexplicably discuss the Commission's "informal relaxation of the rules."

Law § 25-303(g), also received a report from the City Planning Commission regarding the relationship of the designated property to the Zoning Resolution, projected public improvements, and any plans for development of the area involved (A3081).

After a public hearing on March 10, 1988, the Board of Estimate ratified the designations of all the subject theatres in one vote (A3097, A3116-3117). The practice of having a single vote on related matters had been used by the Board of Estimate since at least 1950 and, more specifically, had been routinely employed in approving other Landmark designations (A3117, A3136-3145).

(2)

The Zoning Resolution and the "Special Demolition Permit"

On December 7, 1967, at least ten years before the Landmarks Commission had even begun considering whether individual

Broadway theatres were worthy of Landmark status, the Board of Estimate, acting in the exercise of its zoning power, approved a proposal by the City Planning Commission to create a Special Theatre District (A3042-3043). As a result, the New York City Zoning Resolution was modified to provide theatre owners with certain economic incentives designed to promote the City's goal of preserving, protecting and promoting "the character of the Special Theatre District area as the location of the world's foremost concentration of legitimate theatres, an attraction which helps the City of New York achieve pre-eminent status as a cultural showcase, an office headquarters center and a cosmopolitan residential community" (A3042-3043).

On May 13, 1982, almost fifteen years after establishment of the Special Theatre District and one month after the Landmarks

Preservation Commission had separately voted to calendar public hearings concerning the designation of certain theatres as Landmarks, New York City's Zoning Resolution was further modified by a series of amendments, known as the "Midtown Zoning Amendments," designed to shift development from the east side to the west side of Manhattan (A3043-3044). Several provisions related to Broadway theatres. The "Special Theatre Subdistrict" became the "Theatre Subdistrict of the Special Midtown District" (A3045). The special incentives and controls established in 1967 for the "preservation and rehabilitation of existing theatres" were continued and, in certain cases, augmented (A3045).

In addition, the 1982 amendments listed forty-four theatres which could not be demolished without a special permit issued by the City Planning Commission (hereafter,

"listed theatres").[4] For applicants unable to meet the criteria for issuance of this demolition permit, the legislative scheme provided a hardship exception to the requirement in the form of a variance. See, ZR § 72-01(b). Listed theatres were separately granted increased flexibility in transferring unused development rights (A3047-3048). See, ZR §§ 81-743, 81-746.

On February 5, 1987, Phase I of a comprehensive plan developed by the Planning Commission for the Theatre Subdistrict was enacted by the Board of Estimate (A3054). Among other things, it instituted urban design controls intended "to

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[4] New York City's Zoning Resolution requires demolition permits in numerous other instances. See, e.g., ZR § 103-108 (Preservation Area of the Special Clinton District); ZR § 109-522 (specified buildings in the Special Little Italy District); ZR § 103-07 (Special Planned Community Preservation Districts).

preserve, protect and enhance the character of the theatre subdistrict." ZR § 81-00(h).

Phase II of the comprehensive plan was approved by the Board of Estimate on October 29, 1987 (A3054). Several provisions of the 1982 amendments inuring uniquely to the benefit of theatre owners were modified and made permanent, including the enhanced ability to transfer unused development rights (A3055, A3058-3059). The special demolition permit requirement of ZR § 81-742 was similarly made permanent (A3054-3060). Under the Phase II revisions, however, "listed theatres" which had also been given Landmark status were no longer required to obtain a special demolition permit from the Planning Commission if the Landmarks Commission, after the hardship hearing permitted by Landmarks Law

§ 25-309, had separately authorized demolition (A3058-3059).[5]

The third and final phase of the comprehensive plan was adopted on April 28, 1988. Among other provisions affecting theatre owners, it created a theatre retention bonus designed to encourage owners to maintain use of a given building as a legitimate theatre. In return for such a commitment, the Zoning Resolution permitted even further flexibility with respect to development rights (A3061-3063).[6]

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[5] No one has ever applied for a special demolition permit pursuant to ZR § 81-742 since institution of the requirement in 1982, nor has the owner of any landmarked theatre ever applied under Landmarks Law § 25-309 (A3060).

[6] Contrary to petitioners' assertion that these rights have no value, over one-third of the theatres at issue in this case have already realized their development potential, or can readily do so (A2454-2456).

(3)

Petitioners' Legal Challenge

A special proceeding to review the Landmarks Commission's designations is available in the New York courts for owners who contend that their property is not of Landmark quality. See, Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). On June 20, 1988, petitioners instituted a proceeding combining this statutory review mechanism with a request for declaratory relief (A2338-2342, A2364).

As relevant to the instant petition, petitioners alleged (1) that the Landmarks Law was unconstitutional on its face, and (2) that its specific application to the theatres in question constituted a taking of property without just compensation. The special demolition permit provision in ZR § 81-742 was similarly attacked as unconstitutional on

its face, on the grounds that it allegedly (1) discriminated against theatre owners, and (2) failed to exempt theatres not making a reasonable economic return. Petitioners sought $200 million in unspecified damages (A2364).

Both sides moved for summary judgment (A2819-2821, A2822-2829). Oral argument on the motions was heard on January 12, 1989 (A50-164).[7] Judgment in favor of respondents was entered on February 6, 1990.

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[7] During the course of oral argument, a question arose as to whether testimony was required concerning the voting procedure employed by the Board of Estimate (A154-158). Petitioners' attorney argued that an evidentiary hearing on the matter was necessary because "the constitutional integrity" of the "process" had been put in issue (A217). The limited question of whether the Board of Estimate had departed from its customary procedures in voting on the theatre designations was ultimately resolved in respondents' favor on the basis of affidavits (A3136-3135, A3146-4774).

(4)

Opinion of the Motion Court

After reviewing a 7,000 page record, the Motion Court approved the challenged designations of the 22 theatres, holding that the Landmarks Commission had properly applied the statutory criteria to each of the buildings so designated (A28-29, A32). It further found that the designation process was not accomplished in an arbitrary, capricious, or otherwise illegal manner (24a-28a).[8]

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[8] Petitioners had contended, inter alia, that respondents were improperly using the Landmarks Law to regulate an industry; that there had been irregularities involved in the votes of both the Landmarks Commission and the Board of Estimate; and that the interiors of certain theatres had been improperly designated as Landmarks. While these charges are echoed in the brief supporting the instant petition for certiorari, petitioners have not used them directly as a basis for requesting review by this Court.

With respect to the general constitutional attack on the validity of the Landmarks Law set forth in petitioner's sixth cause of action, the Motion Court noted that this represented a facial challenge to the legislation (24a). It therefore rejected respondents' contention that the matter was not ripe for review (24a). It agreed with respondents, however, that the matter had been disposed of by this Court's decision in Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) (28a-31a).

The Motion Court separately considered petitioner's claim, in their tenth cause of action, that designation of the various theatres as Landmarks constituted a prohibited "taking" of property without just compensation (40a-42a). It found without merit petitioners' contention that application of the Landmarks Law to the subject theatres

lacked the "causal relationship" deemed necessary by this Court in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), for a statute to survive a "takings" challenge (41a-42a). The Motion Court noted that, in Penn Central Transportation Co. v. City of New York, supra, the Landmarks Law was found to substantially advance a legitimate state interest in preserving Grand Central Station (41a). The Court then specifically held that the statute also substantially advanced an equally legitimate government interest in preserving certain Broadway theatres (41a-42a).[9]

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[9] The Motion Court further rejected, as unsupported by the evidence, petitioners' allegation, in their eleventh cause of action, that they had been damaged in the amount of $200 million (42a). Noting that it was unclear whether this claim was asserted with respect to the value of the alleged "taking," or instead represented the diminished value of development rights, the Court held that (Footnote Continued)

With respect to the alleged constitutional infirmities of the Zoning Resolution's separate special demolition permit requirement, the Motion Court was again of the view that petitioners had mounted a facial attack on the validity of the provision (24a). However, it held that petitioners had not met their "heavy burden" of demonstrating, beyond a reasonable doubt, the unconstitutionality of ZR § 81-742 (31a-40a).

More specifically, the Motion Court concluded that because, inter alia, demolition permits are required in other "special districts" and no one particular property was singled out here, ZR § 81-742 does not constitute discriminatory "spot zoning" or "reverse spot zoning" (37a-39a). It further

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(Footnote Continued)
no probative evidence supported either theory (42a).

held that the availability of hardship relief through other provisions of the Zoning Resolution rendered untenable the second prong of petitioners' assault on the constitutionality of the permit requirement, i.e., its alleged failure to exempt financially unviable properties (39a-40a).

(5)

Opinion of the Intermediate State Appellate Court

In an opinion reported at 166 A.D.2d 115, 570 N.Y.S.2d 504, the Appellate Division, First Department, agreed with the lower court that, to the extent petitioners were mounting a facial attack on the constitutional validity of the Landmarks Law, this Court's decision in Penn Central, supra, disposed of the matter (6a-7a). The Appellate Division rejected petitioners' contention that Penn Central involved a challenge, under the Takings Clause, to the consequences of landmarking, whereas their

challenge was to the method or process of designation (6a-7a). It also pointed out that petitioners had not met their heavy burden of demonstrating that the Landmarks Law as applied to the theatres in question deprived them of the essential use of their property (7a).

The Court further held that, insofar as petitioners were claiming that they had been deprived of the economic use of their property, the matter was not ripe for review because petitioners had not made use of the various statutory mechanisms available to owners seeking to alter or renovate a landmarked structure (7a).

With respect to the attack on the special demolition permit, the Court noted that this was a zoning, rather than a landmarking matter (7a). As such, petitioners again bore the "heavy burden" of demonstrating the provision's unconstitu-

tionality (7a). According to the Court, this burden had not been met because there was no evidence that the requirement was not based on a comprehensive plan or lacked a rational basis (7a-8a).

(6)

Actions of the New York State Court of Appeals

On September 19, 1991, the New York State Court of Appeals dismissed petitioners' purported appeal as of right seeking review on constitutional grounds. See, 78 N.Y.2d 1006, 580 N.E.2d 1059, 575 N.Y.S.2d 456.

On December 18, 1991, the same Court refused to grant leave to appeal. See, 78 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651.

SUMMARY OF ARGUMENT

Owners of buildings which have been designated Landmarks who contend that their property is not of landmark quality can readily obtain review of the Commission's

determination in a special proceeding brought pursuant to Article 78 of New York's Civil Practice Law and Rules. The instant petitioners sought such review, and the New York courts unanimously found that the theatres in question met the statutory criteria for designation as Landmarks.

Once a property has been so designated, the New York City Landmarks Law provides a permit mechanism whereby the owner may seek permission to alter or even demolish a landmarked property on several grounds, including economic hardship. The instant petitioners never sought such relief. Accordingly, their claim that application of the statute to the individual theatres violated the Takings Clause of the Fifth Amendment is premature. As this Court has noted on several occasions, it is impossible to evaluate whether a "taking" has occurred until an

owner has obtained a final decision concerning the application of a given statute to the property in question.

Under such circumstances, this Court should also decline petitioners' further invitation to reconsider its determination in Penn Central upholding the validity of the Landmarks Law. Not only was that determination reaffirmed by this Court just five years ago in Nollan, petitioners have pointed to absolutely no conflict in the lower state or federal courts which might require such reconsideration. Petitioners' request is simply a desperate attempt to avoid what every other court which has reviewed the matter has found to be the Landmark Commission's proper application to the subject theatres of a constitutionally valid law.

Finally, the suggestion that the separate "special demolition permit"

requirement of New York City's Zoning Resolution constitutes reverse spot-zoning is completely without merit. Here, too, since no theatre owner has ever applied for such a permit, and since the Zoning Resolution makes available a means of avoiding the application of ZR § 81-742 in the form of a variance, the facts are not ready for review. Furthermore, the existence of a comprehensive plan for the Theatre Subdistrict disposes of petitioners' claim that whatever "discrimination" this special zoning tool may accomplish is constitutionally suspect.

REASONS FOR DENYING THE WRIT

POINT ONE

SINCE PETITIONERS FAILED TO MAKE USE OF THE STATUTORY MECHANISMS DESIGNED TO RELIEVE A PROPERTY OWNER FROM ECONOMIC HARDSHIP ALLEGEDLY CAUSED BY DESIGNATION OF A BUILDING AS A LANDMARK, THE APPELLATE DIVISION PROPERLY HELD THAT PETITIONERS' CONSTITUTIONAL CLAIMS WERE PREMATURE.

This case does not present a novel question. In reviewing the designation as a Landmark of each of the subject theatres, the New York courts followed well-established law. As presented by petitioners, what they term their "as-applied" challenge to the validity of the Landmarks Law is not ripe for review by the courts.

Where a property owner claims that government action, through statute or regulation, is so restrictive as to effect an unconstitutional taking of a particular piece

of property, the claim is premature unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). Accord, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Seawall Associates v. City of New York, 74 N.Y.2d 92, 107, n. 7, 542 N.E.2d 1059 (1989), cert. denied sub nom. Wilkerson v. Seawall Associates, 493 U.S. 976 (1989); Parkview Associates v. City of New York, 71 N.Y.2d 274, 282, 519 N.E.2d 1372 (1988), cert. denied, 488 U.S. 801 (1988); Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183 (1986), cert. denied, 479 U.S. 985 (1986).

This so-called "ripeness" doctrine precludes consideration of petitioners'

takings claims insofar as they concern the effect of the landmark designations on the viable economic use of the subject properties. To the extent that petitioners wish to alter or to demolish the designated landmark theatres, three separate avenues are available to them to seek administrative approval for such action: an application for (1) a certificate of no effect, Landmarks Law § 25-306; or (2) a certificate of appropriateness, whose issuance is based on aesthetic criteria, Landmarks Law § 25-307; or (3) a certificate of appropriateness, authorizing demolition, alterations, or reconstruction and issued on the ground of "insufficient return," if the applicant can show financial hardship in accordance with the provisions specified in § 25-309 of the Landmarks Law. See Penn Central, supra, 438 U.S. at 137.

Petitioners have not shown any specific instance where the designation of their properties as Landmarks has unduly restricted any specific plan to alter, improve, or demolish the subject theatres. Until such time as this occurs, their "takings" claim is premature.

Petitioners, in an apparent attempt to divert attention from the ripeness problem, allege that the New York courts, in general, have misread Penn Central, routinely refusing to engage in any inquiry into the effect of the regulation as applied. As this Court pointed out in MacDonald, Sommer & Frates v. Yolo County, supra, however, such an inquiry cannot be undertaken until a final decision has been rendered by the appropriate agency concerning the extent of the restrictions imposed on the property in question, a determination which has not even been requested here. Id. at 350.

This fact disposes of petitioners' suggestion that the Appellate Division erred in approving the Motion Court's decision not to permit an evidentiary hearing -- a hearing which, in any event, petitioners had originally requested for the purpose of clarifying the Board of Estimate's voting procedures, not, as suggested in the instant petition, to explore the alleged economic effects of Landmark designation. See, note 7, supra, and the Appellate Division's decision (5a, 8a).[10] It also disposes of the further suggestion that the Landmarks Commission itself erred in not considering economic evidence in connection with the designation process. Under the terms of the

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[10] At the Appellate Division, petitioners claimed that the evidentiary hearing would instead have inquired into whether the Landmarks Commission was improperly attempting to regulate an industry (5a).

statute, the permit mechanism is designed to take such factors into account after the initial designation determination has been made.

In sum, since the ripeness doctrine was properly applied by the Appellate Division in the case at bar, there is no basis on which this Court can reach the wider-ranging questions suggested by petitioners as sufficient to require review of their as-applied takings challenge.[11]

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[11] Although petitioners have asked this Court to review the constitutionality of the Landmarks Law "as applied" to the designations of the individual theatres, they appear to have confused an "as applied" challenge with the second prong of the test to determine facial validity of a land-use regulation set forth in Nollan, i.e., the requirement that the owner demonstrate he has been denied "economically viable use of his land." 483 U.S. at 834. The Appellate Division properly found that petitioners had not met this prong of the test, since their claim reduces to the assertion that infringement of their unfettered right to do

(Footnote Continued)

POINT TWO

SINCE THIS COURT SPECIFICALLY UPHELD THE CONSTITUTIONALITY OF THE LANDMARKS LAW IN PENN CENTRAL, AND THEN REAFFIRMED THAT HOLDING IN NOLLAN, THE NEW YORK COURTS PROPERLY HELD THAT THE NEW YORK CITY LANDMARKS COMMISSION WAS AUTHORIZED TO DESIGNATE CERTAIN BROADWAY THEATRES AS LANDMARKS.

The unanimous rejection of petitioners' claims by the reviewing courts is fully in accord with well-established law and was, in fact, compelled by this Court's decision upholding the facial validity of the Landmarks Law in Penn Central. Since that decision was reaffirmed only five years ago in Nollan, petitioners are left with no recourse but to invite this Court to

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(Footnote Continued)
as they please with their property is sufficient to establish a "taking." This Court specifically rejected such a proposition in Penn Central, supra, 438 U.S. at 130.

readdress the issue. Indeed, the desperateness of their situation is seen in the fact that petitioners acknowledge "[t]he affirmative power of government to designate properties as landmarks, and thereby restrict or limit the rights of ownership," Petition at p. 10, while at the same time requesting that this Court strike down landmarking statutes in general, as well as New York City's Landmarks Law in particular.

The resulting conceptual muddle is not resolved by the reasons petitioners offer to justify their request. They do not point to any conflict in the lower state or federal courts resulting from this Court's analysis in Penn Central. Instead, they appear to equate all land-use regulation with zoning and then suggest that "takings" jurisprudence should be rewritten from that

perspective. We believe that this Court should decline the invitation.

First, the charge that landmark preservation, as an activity, fails to provide the "average reciprocity of advantage" discussed in such cases as Pennsylvania Coal Company v. McMahon, 260 U.S. 393, 415 (1922), has already been resolved, and petitioners offer no reason why it should be reconsidered. This Court rejected, in Penn Central, the claim that owners of landmarked buildings do not enjoy a reciprocity of advantage from the landmarking: "Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and structures, ... -- which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law." 438 U.S. at 134-35.

Secondly, it is well established that, where the facial validity of a land-use statute is attacked under the Takings Clause, the test is not whether the legislation is part of the "comprehensive plan" peculiarly characteristic of zoning regulations, which petitioners claim is necessary to establish reciprocity of advantage, but whether the statute or ordinance "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980). Accord, Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485, 495 (1987). In effect, what petitioners are asking this Court to do is to narrow the first prong of the Nollan test to require that a statute challenged on its face embody a

"comprehensive plan" rather than serve to "substantially advance legitimate state interests," and then to further narrow "comprehensive plan" to the meaning of that term in a zoning context.

We respectfully submit that this is a species of semantic legerdemain which would serve no purpose, since not all land-use regulation is a species of zoning. In other words, there is no reason for this Court to reiterate what it has stated twice before, in Penn Central, 438 U.S. at 138, and in Nollan, 483 U.S. at 834-835, i.e., that landmark preservation substantially advances a legitimate state interest and is therefore a constitutionally acceptable activity.

POINT THREE

THE APPELLATE DIVISION PROPERLY HELD THAT THE ZONING RESOLUTION'S "SPECIAL DEMOLITION PERMIT" DID NOT CONSTITUTE REVERSE SPOT-ZONING.

As discussed on pages 10-13, supra, the Zoning Resolution's special demolition permit, which requires an owner of a "listed" theatre to obtain a permit from the City Planning Commission prior to demolition of the structure, is a tool legitimately employed in many of the City's specialized zoning districts. The provision itself permits demolition if its requirement are met, ZR §81-742, and the Zoning Resolution contains a further hardship exception in the form of an application for a variance. ZR §72-01(b). No "listed theatre" has ever applied for the permit.

Under these circumstances, the same ripeness considerations discussed in Point One, supra, are also controlling here.

Indeed, this conclusion is compelled by petitioners' articulated objection to the permit, to wit, their complaint that the City Planning Commission is permitted, but not required, to condition issuance of the permit on the applicant's agreement to allocate a certain portion of any new structure to entertainment-related uses. In other words, the event on which petitioners premise their claim of impermissible reverse spot-zoning may or may not occur, and, if it does, there is further provision in the statute for a variance.[12]

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[12] To the extent that petitioners make the additional claim, in the "Questions Presented" section of the petition, that the special demolition permit impermissibly freezes the use of a building, we note again, (1) that the permit itself allows demolition if its requirements are met; (2) that a further variance mechanism is available; and (3) that several theatres have in fact converted their use from theatrical productions to other forms of business activity (A3108).

Nor is the provision subject to facial attack. The purpose of zoning, unlike the purpose of landmark preservation, is to regulate the use of land, and where, as here, there is special treatment of a lot, area, or category, it is not illegal as long as any such "discrimination" is in accord with a comprehensive plan. See, e.g., Town of Islip v. Caviglia, 73 N.Y.2d 544, 553, 540 N.E.2d 215 (1989); Golden v. Planning Board of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 219 (1972), appeal dism'd, 409 U.S. 1003 (1972).

Appropriate planning objectives include not only enhancement of the quality of life for a municipality's residents, as in Town of Islip, supra, and direction of new development, as in Golden, supra, but preservation of an area for economic purposes, Marcus Associates v. Town of Huntington, 45 N.Y.2d 501, 507, 382 N.E.2d

1323 (1978), and limiting conversion of premises from commercial to residential use to prevent displacement of businesses. Walkbroadway Realty, Inc. v. New York City Board of Standards and Appeals, 120 A.D.2d 998 (1st Dept.), appeal dism'd, 68 N.Y.2d 804, 498 N.E.2d 431 (1986), appeal dism'd, 479 U.S. 1073 (1987).

Here, petitioners did not even attempt to argue below that the required "comprehensive plan" for the Theatre Subdistrict does not exist -- as, indeed, they could not. See, discussion on pages 9-13, supra. The special demolition permit provision merely aids in furthering the objectives of this plan, i.e., to preserve and encourage development of the Broadway

theatre area as a viable part of the City's economic and cultural life.[13]

In sum, the Appellate Division properly rejected petitioners' theory that any statutory "discrimination" is a per se evil, concluding instead that the City's comprehensive plan for the Theatre Subdistrict constituted sufficient justification for institution of the special permit requirement. See, Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 12, 359

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[13] The existence of this plan also renders readily distinguishable such cases as Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), cert. denied, 429 U.S. 990 (1976), where the Court found that the legislation in question did not have a substantial relation to a "legitimate government purpose." Nor does Vernon Park Realty v. City of Mt. Vernon, 307 N.Y. 493, 121 N.E.2d 919 (1954), provide any support for petitioners, since the special permit requirement has nothing to do with the use of a listed theatre, but merely prohibits demolition unless certain requirements are met.

N.E.2d 337 (1976) (a statutory discrimination will not be set aside "if any state of facts may reasonably be conceived to justify it"). See also, United States v. Carolene Products, 304 U.S. 144 (1938) (legislation enacted pursuant to the police power will be upheld as constitutional if it bears a rational relationship to a legitimate government interest). In light of the facts, the nature of the statutory scheme, and the controlling case law, petitioners' claim of illegal reverse spot-zoning is untenable.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 24, 1992

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No. 91-1382

In The

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October Term, 1991

THE SHUBERT ORGANIZATION, INC., et al.,

Petitioners,

v.

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court, Appellate Division, First Judicial Department of the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying amicus curiae brief in support of the Shubert Organization and the other petitioners pursuant to Supreme Court Rule No. 37 urging this Court to grant the petition for certiorari.

Written consent to the filing of this brief has been granted by counsel for petitioners and counsel for

respondents expressed in writing no objections. Consent has been withheld by counsel for intervenor-respondent Save the Theatres, Inc., requiring the filing of this motion. Copies of these consent letters have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in the litigation of matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The New York Supreme Court, Appellate Division, ruled that the Landmark Law of the City of New York was previously adjudicated as valid by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). As a consequence the New York court held as a matter of law that no taking of private property without the payment of just compensation resulted from the landmarking of the theatres on Broadway and the prohibition of their demolition or alteration. However, by the direct application of *Penn Central* in this manner, the lower court refused to adhere to the admonitions of this Court in that case regarding the need for an *ad hoc* judicial evidentiary hearing. PLF believes that this serious

misapplication of *Penn Central* sets the stage for wholesale intrusions on the fundamental right to reasonable use of private property.

Attorneys for PLF have participated in numerous land use takings cases before this Court and other courts as *amicus* and in representing property owners. PLF participated as amicus in *Penn Central* and PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

Amicus firmly believes that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below conflicts with the precedents of this Court, including *Penn Central*, and other federal authorities holding that even a valid

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[1] PLF has also participated as *amicus* in other "takings" cases before this Court such as in *Yee v. City of Escondido*, No. 90-1947 (Apr. 1, 1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, No. 91-453 (Jan. 1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 447 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981); *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987).

regulation that deprives a landowner of economical viable use of property or frustrates reasonable investment-backed expectations will result in an unconstitutional taking of private property if just compensation is not paid. To insure that the overriding purpose of the Takings Clause is met, *i.e.*, to bar government from forcing selected property owners alone to bear public burdens which should be borne by the public as a whole, it becomes essential for the state courts to afford property owners, as a minimum, an *ad hoc* judicial inquiry regarding the particular circumstances of each case. This includes analysis of the economic impact of the regulation on the property, the extent of interference with distinct investment-backed expectations, as well as the character of the governmental action and any other relevant factors. *Penn Central*, 438 U.S. at 124.

For the foregoing reasons, Pacific Legal Foundation requests that the motion to file the annexed brief amicus curiae be granted.

DATED: April 27, 1992.

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of amicus Pacific Legal Foundation (PLF) is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

In 1982, the Helen Hayes and Morosco Theatres were razed to accommodate a city-promoted effort to revitalize Time Square. This included building a major new hotel at

Broadway and 45th Street (now the Marriott-Marquis Hotel) which incorporated the construction of new legitimate theatres. The ensuing outpouring of public concern over the loss of these two theatres led to a complete reversal in city policy from replacement to preservation of existing Broadway theatres.

Between October, 1987, and January, 1988, the city's Landmarks Preservation Commission (Commission) issued landmark designations for 28 theatres (some were landmarked as to interior as well as exterior) of which 22 are owned by the petitioners and are the subject of this action. In addition, regulations of the New York City Board of Estimate prohibit the demolition of these theatres without a Special Demolition Permit obtainable only on a showing that the theatre is unsafe for continued use, or with findings by the City Planning Commission "[t]hat demolition of the theatre structure will not unduly diminish the character of the Theatre District as a cultural, entertainment and theatrical showcase." Zoning Resolution 81-742.

Petitioners timely filed for judicial review of the landmark designations.[1] The trial court refused to conduct an evidentiary hearing regarding the economic impact of these designations and also dismissed petitioners' takings damage claims without an evidentiary hearing. Based on Justice Brennan's statement in *Penn*

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[1] The property owner in *Penn Central* had opposed the landmark designation before the Commission, but did not seek judicial review of the final designation decision. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 116 (1978).

Central Transportation Company v. City of New York, 438 U.S. 104, to the effect that "a city *may*, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on development of individual landmarks . . . without effecting a 'taking,' " *id.* at 107 (emphasis added), the trial court concluded as a matter of law that a landmark designation cannot result in a taking.

On appeal, the Supreme Court, Appellate Division, similarly concluded that "[s]ince the [United States] Supreme Court in *Penn Central* . . . clearly ruled that the application of the Landmarks Law does not affect a taking of the property, the constitutional challenge thereby is resolved." *Shubert Organization, Inc. v. Landmarks Preservation Commission of the City of New York*, 570 N.Y.S.2d 504, 508 (1991).

Even assuming that the Landmark Law as applied to these theatres does substantially advance a legitimate governmental interest (and does not exist solely for the preservation of the economic interest of the industry or the city) it does not follow that this is the end of the required inquiry. Still to be adduced are questions of whether there has been a violation of the Fifth and Fourteenth Amendments requiring the payment of just compensation for the use of private property for public purposes, and whether the burdens of societal obligations or benefits have been unfairly placed on a select group of property owners.

Amicus respectfully submits that the ruling of the New York court in this matter is not only contrary to the law of takings jurisprudence that has been developed by

this Court, but it is also irreconcilable with the majority opinion in *Penn Central* on which it relies.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that regulatory acts of government violate the Takings Clause of the Fifth Amendment if the action fails to substantially advance legitimate governmental interests, denies economic use of one's property, *or* frustrates reasonable investment-backed expectations. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). The function of these indicia is to reveal whether a select group of property owners is being unfairly required to bear societal and general welfare burdens with little or no private benefit. *Yee v. City of Escondido*, No. 90-1947, slip op. at 1 (Apr. 1, 1992); *Nollan*, 483 U.S. at 825 n.4; *Penn Central*, 483 U.S. 104 at 147-49 (Rehnquist, J., dissenting).

The ordered preservation of these private structures, because their continued use as theatres is beneficial to New York City and society generally, and not to prevent some noxious use, clearly results in a taking of private property. The city has not only acquired a servitude in the land for public use comparable to the "navigational servitude" in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), but has also placed on the owners an affirmative duty to maintain the structures in their current condition for the benefit of the public.

More importantly, the majority opinion in *Penn Central*, relied on by the city, acknowledges that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. As a result it is imperative that the trial court engage in "these essentially ad hoc, factual inquiries" to ascertain the economic impact of the regulation on the claimant as well as the character of the governmental action. *Id.*

REASONS FOR GRANTING CERTIORARI

I

THE FIFTH AMENDMENT BARS GOVERNMENT FROM FORCING SOME PEOPLE ALONE TO BEAR PUBLIC BURDENS WHICH IN FAIRNESS SHOULD BE BORNE BY THE PUBLIC

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As the now Chief Justice correctly noted in *Penn Central*, the New York City Preservation Law places the entire economic burden on the owner of the designated property with none of the reciprocal benefits that flow from zoning restrictions:

> Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment
>
> > "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public a full and just equivalent shall be returned to him." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

Penn Central, 438 U.S. at 147-48 (Rehnquist, J. dissenting). The theatre owners are penalized, not for any "noxious" use of their property, but precisely because they did "*too good* a job" in designing, building, and maintaining these structures and must now preserve and maintain them unchanged for the benefit of sightseers and tourists. *Id.* at 146 (emphasis in original; Rehnquist, J., dissenting).

As Justice Brennan observed in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981):[2]

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[2] While Justice Brennan's opinion was a dissent, the now Chief Justice made it clear in his concurring opinion that except for

(Continued on following page)

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

Id. at 652 (footnote omitted).

Clearly, the imposition of landmark designations coupled with the inability to modify the structures or otherwise convert the properties to other legitimate uses that are enjoyed by adjoining properties results in a Fifth Amendment taking without payment of just compensation. The fact that these theatre owners have no plans to demolish or convert to other uses has no bearing either upon ripeness nor the fact that a servitude has been placed on their properties that reduces their fair market value.

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the "final judgment" issue he "would have little difficulty in agreeing with much of what is said in the dissenting opinion," which would have otherwise placed this as the majority opinion. *Id.* at 633.

II

GOVERNMENTAL ACTION RESULTING IN A REGULATORY RESTRICTION ON THE USE AND ENJOYMENT OF PRIVATE PROPERTY REQUIRES A JUDICIAL CASE-BY-CASE FACTUAL ANALYSIS

The Appellate Division below relies on the fact that the theatre owners can still receive the economic benefit of continued use of the buildings as theatres and make use of transferable development rights (TDRs). This same issue was raised in *Penn Central* as to whether TDRs constituted just compensation, but was not addressed. In that case, however, the owners were invited to submit additional evidence on the issue and "[a]ppellants chose not to avail themselves of this opportunity." *Penn Central*, 438 U.S. at 122. In contrast, the theatre owners here were denied all opportunity to present factual evidence at a judicial hearing.

The fact that owners may have some residual usage or "can still walk on, or ride a bike on, or look at their land does not, at this preliminary stage of the case, reassure us [that a taking has not occurred]." *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990). As further stated by the court in *Lockary*:

> However, the determination of what constitutes an economically viable use of land requires a case-by-case factual analysis of the particular circumstances presented. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Resolution by plenary hearing rather than by summary judgment is particularly important for claims of regulatory taking. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 177 (4th Cir. 1988).

Lockary, 917 F.2d at 1155.

Even assuming that the application of the Preservation Law to the theatres in question substantially advances a legitimate governmental interest, that does not end the inquiry as the New York courts below erroneously concluded. As stated recently by the Ninth Circuit in another recent case, *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991):

> The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owners'] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.

McDougal, 942 F.2d at 680. *See also Kaiser Aetna v. United States*, 444 U.S. at 174-75; and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). "There is no set formula to determine where regulation ends and taking begins." *Id.* at 594.

More recently Justice O'Connor writing for the majority of this Court in *Yee v. City of Escondido* and relying on *Penn Central* stated that a regulatory takings case "necessarily entails complex factual assessments of the purposes and economic effects of government actions." Slip op. at 1. It is difficult to envision how complex factual issues can be disposed of as a matter of law or by summary judgment as has occurred in this case.

For the proper resolution of this matter, concepts of due process require that a judicial trial be conducted

examining the economic impact of the landmarking of the sites, the nature of the governmental action, and a determination as to whether TDR rights and other benefits, if any, constitute just compensation.

CONCLUSION

The Takings Clause of the Fifth Amendment as incorporated into the Fourteenth exists to shield the owners of private property against government regulation that "goes too far." As observed by Justice Holmes in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922): "When this seemingly absolute protection [of the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415.

Today, the temptations of government for "off budget" financing of social demands and concerns have made Justice Holmes' observation even more critical. Now government seeks to provide societal solutions through the regulatory process by placing the costs on select owners of property, and thereby avoid the politically sensitive issues of funding, taxation, budgeting, and prioritizing expenditures for new social programs. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the city proposed to require landlords to bear the costs of subsidizing increased rents of hardship tenants, which is normally a function of government. Justice Scalia appropriately observed:

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.

Id. at 22 (Scalia, J., concurring in part and dissenting in part).

Without the intervention of this Court, it is inevitable that government will, with increasing frequency, continue to misuse its regulatory authority to shift the political demands of social, economic, and cultural improvements onto the backs of selected property owners who are in no way responsible for the social condition to be remedied. To the contrary, the good design, construction, maintenance, and continued use of these theatres by their owners has led to the landmark designation and the consequential loss of economic viable use and substantial interference with reasonable investment-backed expectations.

Here the city ostensibly wants to preserve the historical and cultural heritage of the old Broadway theatres in New York. The purpose may be legitimate, but that does not conclude the takings analysis that these owners are entitled to under *Penn Central* and the many other cases examined by this Court. The owners are to be afforded a judicial evidentiary hearing as to the economic impact of the landmark designations on each of the properties, the nature of the governmental action, and whether TDR rights and any other benefits constitute just compensation.

For the reasons stated above and in the petition for certiorari amicus, Pacific Legal Foundation, urges this Court to issue a writ of certiorari to review the judgment and opinion of the New York Supreme Court, Appellate Division.

DATED: April, 1992.

Respectively submitted,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT, APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

MOTION AND BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC. AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF THE REAL ESTATE BOARD OF NEW YORK, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The Real Estate Board of New York, Inc. (the "Board") respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of the petition for certiorari.

Petitioners herein have consented to the filing of this brief, and defendants-respondents have no objection. Their letters to that effect have been lodged with the Clerk. Only the intervenor-defendant-respondent (itself ordinarily an amicus below) has declined to consent, necessitating this motion.

Interest of the Real Estate Board of New York, Inc. as Amicus Curiae

The Board is a New York association founded in 1896 consisting of those involved in the real estate industry, including property owners, developers, lenders, managers, brokers, etc. Its current membership consists of approximately 4500 firms and individuals. Most of its members own property in New York City and the surrounding metropolitan area of New York, in addition to many who own interests in real property throughout the United States and the world.

The Board has a philosophical commitment to the traditional respect our society affords to private property and private property rights. On a more practical level those Board members who are concerned on a daily basis with questions involving the ownership and operation of real property in New York have a strong interest in seeing that the laws affecting real property and its administration are reasonable, clear, of relatively easy application, and capable of operating at high levels of predictability. Therefore, the Board has a substantial interest in decisions that will have an impact upon real property law in general and particularly with respect to the regulation of land use and development involving zoning, code enforcement and other aspects of real estate regulation under the police power and, in the present situation, including landmarks and historic district preservation as it is currently operating in the City of New York.

It should be noted at the outset that the Board filed a brief *amicus curiae* in the case of *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), in January 1978 setting forth its views as to the impact of that case upon the subject of historic district and landmarks preservation in the City of New York. The decision in that case was the first, and to this date remains the sole, statement on that subject by this Court, and it is submitted, in view of the widespread activity in the field and the differing fact situation in this case, merits review by this Court at this time.

Reasons for Granting the Motion

It is the opinion of the Board that if the legal analyses and conclusions of the New York courts in this case are allowed to stand, it will continue to subject real property to governmental restraints which in many instances constitute a taking of property or deprive property of its value without compensation, introducing thereby large areas of uncertainty and unpredictability into the ownership and operation of real estate. These unsettling effects of the decision of the New York courts in this case will be felt in landmarks and historic district preservation and other related fields of law, inasmuch as the decision transcends the interests of the litigating parties and applies to a large number of properties in the city. Consequently the Board urges this Court to grant this motion and the petition for certiorari so that the Court may consider the basic constitutional validity of the actions of the government in this area and the views of the New York courts as to the validity of those actions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1382

THE SHUBERT ORGANIZATION, INC., *et al.*,
Petitioners,

—v.—

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC., AS AMICUS CURIAE, IN SUPPORT OF THE PETITION

Preliminary Statement

The Real Estate Board of New York, Inc. (the "Board") submits this brief as *amicus curiae* in support of the petition dated February 22, 1992 of petitioners The Shubert Organization, Inc. et al for a writ of certiorari to review the May 16, 1991 decision and order of the New York Supreme Court, Appellate Division, First Judicial Department, which affirmed the judgment of the *nisi prius* Court dismissing petitioner's Article 78 (mandamus) proceeding and the complaint in an action for declaratory judgment.

The interest of the Board as amicus is set forth in the preceding motion for leave to file this brief.

Reasons for Granting the Writ

The statement of the case, the opinions below, the jurisdictional statement, and the constitutional and statutory provisions are adequately set forth in the petition for *certiorari* and consequently will not be repeated here.

When the New York City Landmarks Preservation Law (NYC Charter Chapter 74, Section 3020; NYC Admin. Code Title 25 Sections 25-301 through 321) was enacted in 1965, it represented one of the most comprehensive statutes in the United States dealing with the designation and preservation of landmarks and historic districts.[1]

At that time doubt existed as to the basic issue of the degree to which regulation by governmental authorities under the police power was so excessive as to constitute a "taking" requiring a nullification of the ordinance or the payment of just compensation under the provisions of the 5th and 14th Amendments of the United States Constitution or the coordinate provisions of the constitutions of the several states. Although determinations of lower courts were made affirming the validity of the statute, there were some holdings declaring actions of the Landmarks Preservation Commission (created by the NYC Charter Chapter 74 § 3020) invalid as applied.[2] However, this Court has since 1978 dealt with a series of cases involving the basic issue of the scope of police power regulation, but in no instance did it consider the generic subject of landmarks and historic district preservation.[3]

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1 Morris, *Historic District and Landmarks Preservation*, 2A Warren's Weed New York Real Property (Matthew Bender & Co.).

2 *French Investing Company, Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, *appeal dism'd*, 429 U.S. 990 (1976); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *In the Matter of Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185 (1966).

3 *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 672 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *United States v. Cherokee Nation*, 480 U.S. 700 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S.

Predicated upon the holding by the majority of this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), it appears that both federal and state courts have accepted, as resolved facially, the basic constitutional validity of landmarks and historic district statutes. These decisions seem to have been made in disregard both of *Penn Central's* insistence upon the necessity of a factual analysis of the takings issue, and of the results of the analysis actually there undertaken—the historic use of Grand Central Terminal was not interfered with by the designation, and rights conceded to be valuable were afforded by reason of the designation. The state and lower Federal Court decisions have also ignored all the observations found in the dissenting opinion in *Penn Central* written by Justice (now Chief Justice) Rehnquist and concurred in by Chief Justice Burger and Justice Stevens.[4]

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340 (1986); *City of Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See generally* Morris, *Monetary Damages as a Remedy*, 52A Rohan, Zoning and Land Use Controls (Matthew Bender & Co.).

In addition, the case of *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *cert. granted* November, 1991, is currently *sub judici* before this Court.

4 A recent case which seems to challenge the broad acceptance of the holding by the majority in *Penn Central* is *United Artists Theatre Circuit v. City of Philadelphia*, 125 Pa. Comm. 520, 558 A.2d 155 (1991). In that case the Supreme Court of Pennsylvania reversed the lower courts' holdings that the designation of the Boyd Theatre in Philadelphia as a landmark under the provision of the "Historic Buildings, Structures, Sites, Objects and District" provisions of the Philadelphia Code (§ 14-2007) was proper. It held that the designation, without the consent of the owner, was "unfair, unjust and amount to an unconstitutional taking without just compensation in violation of Article I § 10 of the Pennsylvania constitution." Reargument of the case was

Summary of Argument

This case again[5] presents for evaluation by this Court the basic issue of when may regulation by a municipality, exercised under the guise of the police power, be so excessive as to constitute a taking for public use which, to validate the action, requires the payment of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States or alternatively are facially violative of the rights of owners of real property.

The enactment by the municipality (the City of New York) of the Landmarks Preservation and Historic Districts Act *supra* authorizes *inter alia* the Landmarks Preservation Commission ("LPC") to destroy valuable property rights by the designation of property as a landmark. These valuable property rights include the right to possess, use and dispose of property (frequently characterized as the bundle of rights which inhere in ownership of real property in fee simple) which can be subjected, by the designation to a nonconsensual servitude requiring it to be maintained in its present state forever, unless it is permitted to make changes by the grace of the LPC. This action by government should constitute a taking unless it is exercised under (1) the nuisance exception, (2) a circumstance where the taking secures "an average reciprocity of advantage"[6] as in the case of zoning,[7] (3) a proper and reasonable exercise of regulation under the police power for the health, safety, morals and general welfare of the public,[8] or (4) where just compensation is paid to the owner

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allowed on December 6, 1991 and is *sub judici* as of the time of this writing. Moreover, as it stands, the decision is unclear as to whether it is a holding which declares the statute "facially" unconstitutional or merely invalid "as applied".

5 Note 3 *supra*.

6 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

7 *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926).

8 *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

under the Fifth and Fourteenth Amendments by the government where the property has been taken for a public purpose or a public use.[9]

It is within the scope of these legal doctrines that this case should be viewed; a basis which the state courts have failed to do. The nuisance and zoning exceptions have no application here, and consequently need not be dealt with in this brief. However the doctrines of the extent of the police power and the just compensation principles of law are clearly implicated.

ARGUMENT

UNDER ANY ASPECT OF THE POLICE POWER THE ACTION OF THE COURTS BELOW CANNOT BE SUSTAINED

In *Yee v. City of Escondido*, 112 S.Ct. 294 (1992) (unanimous decision with two concurring opinions), this Court succinctly stated the current status of the law relevant to the police power as follows:

> "The Takings Clause of the Fifth Amendment provides: 'Nor shall private property be taken for public use, without just compensation.' Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g.,

9 *Berman v. Parker*, 348 U.S. 26 (1954).

> Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-125 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."

In this case there is no claim of a *per se* taking as a consequence of a physical occupation of the property. Instead it deals exclusively with the regulation of the property and involves factors concerning the constitutionality of the statute both facially and as applied under the facts of the case which limits and impairs the use of the property and unfairly burdens the owners of it.

Thus, the core of the police power as it is involved in this case is concerned with the safety and welfare of the community. However, a property designated under a police power statute is required to assure a reasonable return and does not, through the coercion of affirmative acts, compel the burden of the designation to fall disproportionately on a single property owner. Where action is taken at a community level, which necessarily diminishes the value of property because it may not be used for the forbidden purposes, it must nevertheless assure that the owner is able to earn a reasonable return on the property. In addition, where the general benefit of all the people is served, this Court has held that the government may not load "upon one individual more than his just share of the burdens . . . when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[10]

Thus, where the statute inadequately provides for these requirements it impermissibly invades the rights of the owner and constitutes a facial violation of the police power authority.[11] It will be established below that the New York Land-

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10 *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

11 *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

marks Preservation and Historic Districts Act fails to meet these standards and, as a consequence, is facially invalid and must be stricken. It will also be established that even if it is found that facially the statute is sustainable, the facts involved in this case render it invalid "as applied" and as a result it should be stricken, as well.

1. Facial Invalidity

In considering the validity under the police power of a statute on its face, two elements are involved. The first and most fundamental is the issue of whether the burden associated with the desire of a municipality to preserve privately owned real estate as a landmark should be borne by the individual owner or by the taxpayers of the community at large, all of whom purportedly enjoy the enhanced lifestyle associated with the preservation of specific parcels of real estate as landmarks, i.e. the doctrine of the balancing of the equities. The second is whether the police power statute contains adequate provision for affording the owner the right to use the landmarked property in a manner which permits an adequate return on "investment backed expectations."[12]

(a) Balancing the Equities

Unlike zoning, which applies to and benefits all real estate, the landmarking of an individual parcel casts the entire diminution of value upon the owner and thus deprives that owner of the "average reciprocity of advantage" enunciated by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon.*[13] This reciprocity cannot exist where a property is singled out and treated differently from the properties surrounding it and from the others (not landmarked) in the community. Moreover, under the landmarks procedure specified by the New York statute there is imposed upon the designated property a nonconsensual servitude in perpetuity or an affirmative duty upon the owner to preserve the exterior (and in some

12 See note 8 *supra.*

13 260 U.S. 393 (1922).

instances the interior) solely at the owner's expense without any contribution from the benefitting public entity imposing the onerous regulation.

This Court has held categorically that government may not force some people to bear public burdens which should be borne by the public at large. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This burden is precisely what the City of New York is imposing upon private owners of landmarked properties and as such should be held to be facially invalid.[14] Accordingly, certiorari should be granted to afford this Court the opportunity to right the wrongs which have become endemic countrywide in requiring property owners to bear the full cost of preserving buildings of historic or architectural interest for the benefit of the public at large. This is particularly so where there are more feasible and equitable methods of accomplishing the same result such as the taking of restrictive easements or employing tax incentives to encourage private preservation of landmarks.

(b) Reasonable Return

The Court has held that even where the use of the restriction does not deprive the owner of all reasonable value of the property, the inability of the owner to make a reasonable return requires compensation under the Fifth Amendment of the United States Constitution. *United States v. Lynah*, 188 U.S. 470 (1903). Moreover, the use of the term "just compensation" employed in the language of the Fifth Amendment has been held to mean "a full and perfect equivalent

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14 The New York Court of Appeals did not hesitate to hold a parallel statute to be facially invalid in the case of *Seawall Associates v. City of New York*, 74 NY2d 92, 544 NYS 2d 542, *cert. denied*, 110 S.Ct. 500 (1989). In that case it invalidated a statute which compelled the owners of single room occupancy (SRO) buildings to be rehabilitated, adequately maintained and then rented out to low income tenants on a rent regulated basis. This holding of facial invalidity was arrived at on the theory that it was violative of the constitution to require individual owners to bear the full cost of subsidizing such tenants in order to benefit the City by assisting in taking care of its homeless and indigent tenants, a role which should properly be imposed upon all taxpayers.

for the property taken." *Monongahela Navigation Co. v. The United States*, 148 U.S. 312, 326 (1893). In the challenged New York statute no provision is made to allow for any compensation to the owner for the use deprivation involved. Thus, there is no provision in the statute making available the means to earn a reasonable return, and as a result the statute cannot pass constitutional muster.

It has been argued that the constitutional requirement for a reasonable return is met by the hardship definition set forth in NYC Admin. Code Section 25-302(v) which provides for a net annual return of 6% on the current assessed value established by the City or the sales price paid for the property under a number of prescribed conditions. However, this so-called reasonable return provision as contained in the New York statute in no way insures the owner of any return. It merely provides that, where the prescribed return cannot be made under the landmark restrictions, the City has the right, where all conditions of the definition are met, to allow tax abatement or the right to make certain specified types of alterations or as a last resort to require that the property be condemned by the City. It also provides that in the alternative if the City refuses to take the property in an eminent domain proceeding then it may permit demolition of the building. The relevant provisions of the statute are as follows:

> v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.
>
> (2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the request for a certificate of appropriateness; provided that:
>
> (a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed

valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as the result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25-309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

Aside from the highly circumscribed conditions under which the hardship provision can come into play and the limited relief it accords to an owner, the standard itself is patently unreasonable. Assessed valuations in New York City are currently and have for years been fixed at 45% of the fair market value of the property. Thus the 6% return amounts

to less than a 3% return based upon the City's own figures. Such a return, on so insecure a base, can scarcely constitute facially a reasonable return on the ownership of a highly speculative building which would be eligible for landmark designation, irrespective of its historical or aesthetic merits. Moreover, compliance with these "reasonable return" provisions which would entitle an owner to some benefits is a long, arduous process; in fact, in the seventeen-year history of the Commission relief has rarely been granted and is not likely to be in the future.

Thus, there is also a failure on the face of the statute to "provide for the reasonable return" required by this Court to withstand constitutional challenge.

2. Invalidity of the Action Under the Police Power as Applied

In the petition for certiorari dated February 25, 1992, under the heading "The Reasons for Granting the Writ" (at pp. 7-17), there is set forth in detail an argument dealing with "the question of the severity of the impact of the law on appellants' parcels" and an analysis is made of the actual impact of the statute upon the facts in this case. This argument is set forth effectively (although in summary fashion) and consequently need not be repeated in this brief, but it does establish clearly that even in the event this Court should determine that the New York statute is not vulnerable on the ground of its facial unconstitutionality, certiorari should nevertheless be granted so that it may be reviewed "as applied" to the twenty-two theatres involving thirty-nine designations by the Landmark Preservation Commission of the City of New York.

In considering the "as applied" impact of the challenged designations, this Court should make clear that where, as in this case, a property owner has made a prima facie evidentiary showing that a regulatory taking has occurred, the owner must be afforded a judicial factual assessment of the purposes (*cf. Nollan v. California Coastal Commission*, 483

U.S. 825 [1987]) and the economic effects (*cf. Penn Central, supra*) of the governmental action.

It should also be emphasized that (as is common knowledge) these are old obsolete theatres which constitute fire hazards and which are dark a good deal of the time. In addition, the designation of the interior of some of the properties will create serious difficulty in the staging of theatrical performances of a special nature such as "Cats", "Les Miserables", etc. which require major interior alterations. These alterations cannot be accomplished without the prior approval of the Landmarks Preservation Commission, a procedure (as illustrated by other types of alterations of this sort) which is not only difficult to obtain but involves a long and complicated process required for favorable action by the Commission. This problem is so serious that it could well result in the inability of the petitioners as owners of the theatres to put on performances of this type in New York which has traditionally, (along with London) been the live theatre center of the world.

The New York Courts in affirming the constitutional validity of the designations failed to give full consideration to these facts as applied and relied instead upon the determination of the majority in the *Penn Central* case, which merely held that, in *Penn Central*, there were mitigating circumstances which served to sustain the action of the Commission. These circumstances are not present in the case of the theatres designated in this case, and consequently this Court should grant certiorari.

Conclusion

THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI.

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No. 91-1382

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OCTOBER TERM, 1991

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This brief is submitted by petitioners (i) in reply to the briefs in opposition of the municipal defendants-respondents, and of the intervenor-defendant-respondent, Save The Theatres, Inc., and (ii) in further support of their petition for a writ of certiorari herein.

Both respondents oppose the petition on the ground of alleged prematurity. As to the merits, the municipal respondents take the position, as did the courts below, that *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), ends inquiry as to an as-applied challenge to a landmarks law. The intervenor respondent instead argues that the courts below did attempt to comply with their responsibility under *Penn Central* and other precedents of this Court. It is submitted that (i) the municipal respondents' position is in

direct conflict with, and manifests a fundamental misinterpretation and misunderstanding of, the opinions of this Court; and (ii) the intervenor's position is belied by the record.

THE QUESTIONS HERE RAISED BY PETITIONERS ARE RIPE FOR REVIEW

In consideration of the questions presented for review, it is necessary to distinguish between as-applied claims and facial challenges, the latter not being subject to a ripeness objection (*Yee* v. *City of Escondido*, ____ U.S. ____, 60 U.S.L.W. 4301 [1992]; *Pennell* v. *City of San Jose*, 485 U.S. 1 [1988]; *Keystone Bituminous Coal Ass'n.* v. *DeBenedictis*, 480 U.S. 470 [1987]; *Agins* v. *Tiburon*, 447 U.S. 255 [1980]). No issue of ripeness thus bars consideration of the facial challenges presented by the petition.

Furthermore, respondents' prematurity argument to petitioners' as-applied challenges is without merit. It is premised on the petitioners' lack of an application for a hardship exemption under the Landmarks Law (§ 25-309, Pet. App. 62a-70a). Relief under the hardship exemption, however, is not available unless the property owner can demonstrate that the property does not provide a "reasonable return", defined as six per cent of assessed valuation (§ 25-302[v], Pet. App. 50a).[1] The hardship provision thus does not recognize any other possibility of an unconstitutional uncompensated taking arising under any circumstances whatsoever, despite the undeniable burdens on the use of the property, and the diminished value or profitability of the property. The hardship exemp-

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1 In fact, the return provided for under this provision is significantly less than it would facially appear. New York City property is assessed at 45% of market value. Thus, property returning as little as 2.7% of market value will be denied a hardship exemption. Without belaboring the point at this time, it is respectfully submitted that this test is insufficient to meet constitutional requirements. This issue was raised and considered at some length below (Pet. App. 28a-31a), and if certiorari is granted, will be fully aired here (*cf.* the amicus brief in support of the petition submitted by the New York Board of Realtors, Inc.).

tion therefore does not offer the opportunity for relief from a taking, unless the taking consists of a virtual total diminution in value. This, however, is precisely the simplistic bright-line test that *Penn Central* and numerous other opinions of this Court caution against.[2] Moreover, any hardship hearing under the landmarks law would not involve consideration of the manifold factors this Court has determined are necessary to a determination of whether a regulation of property has gone "too far" and become an uncompensated taking.[3]

A taking should be subject to challenge at the time of the taking, and since that is the time of the designation, then that is when the challenge should be made.[4] To require a second separate proceeding before the same agency, particularly

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2 The municipal respondents make passing references (Br. 2, 28) to the existence of other exemptions, namely a Certificate of No Effect (§ 25-306, Pet. App. 58a-59a) or a Certificate of Appropriateness (§ 25-307, Pet. App. 59a-61a). There, however, the only factors the Commission may consider are aesthetic ones, not even reasonable return, to say nothing of any other factors relevant to a takings analysis. In any event, the Commission lacks the power to grant exemption under these sections to many landmark modifications. For instance, the gutting of an interior-landmarked building could not possibly be granted a Certificate of No Effect, because it certainly does have an effect; nor could a Certificate of Appropriateness be granted, because destruction certainly is inappropriate to the "protection, enhancement, perpetuation and use" of the protected features, the statutory test (§ 25-307[d], Pet. App. 61a). See *Lutheran Church* v. *City of New York*, 35 N.Y.2d 121, 124, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

3 The exemption process here thus differs from the variance procedure under most zoning and other regulatory schemes, which typically allow the reviewing entity to consider any and all relevant factors. See, *e.g.*, *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172 (1985), heavily relied upon by both respondents' briefs, where the Court quoted the regulation allowing a variance " 'where the subdivider can show that strict adherence to these regulations would cause unnecessary hardship' " (at 188 n.9).

4 This Court in *Penn Central* (438 U.S. at 132) noted the limitations placed upon a later challenge by the failure there of the landowner to seek to review the designation. Now respondents here urge a ruling that review at the time of designation is premature. A landowner simply cannot be whipsawed in such a fashion.

when the agency is not empowered to consider all relevant criteria, is absurd.

If there is no "potential for . . . administrative solutions" (*Hodel* v. *Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 297 [1981]), because the agency lacks the power to grant relief or because it will not consider relevant factors,[5] then "failure" to seek an administrative solution cannot justify denial of judicial review on ripeness grounds.

THE COURTS BELOW MISAPPLIED *PENN CENTRAL* AND OTHER TAKINGS PRECEDENTS OF THIS COURT

As appears from the municipal respondents' Counterstatement of Questions Presented, as well as the text of their brief, these respondents' position is that if preservation of theatre property is a legitimate government interest, and there exists a "causal relationship" between the means and the regulatory purposes, then under *Penn Central* constitutional inquiry is at an end.[6] The municipal defendants do not attempt to refute petitioners' demonstration that the courts below did not make the necessary takings analysis mandated by this Court's numerous decisions. Indeed, it is argued that

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5 In both *Lutheran Church* v. *City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), and *Society for Ethical Culture* v. *Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980), the New York Court of Appeals decided the merits of as-applied takings claims under this very landmarks law—sustaining the contention in *Lutheran*, rejecting it in *Ethical Culture*—although no hardship applications had been made, because the "reasonable return" test considered under such applications would have been manifestly insufficient to determine whether a taking had occurred (the property owners were not-for-profit entities).

6 Both respondents' briefs repeatedly refer to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as "reaffirming" *Penn Central*. It did so only in the sense, conceded here by petitioners (and, for that matter, by the property owners in *Penn Central* [*see* 438 U.S. at 129]), that landmarking is a legitimate government goal. *See Nollan* at 834. The court in *Nollan* had no occasion to consider the points urged here.

the courts below did not have to do so.[7] This position makes clear and lucid the need for resolution of the issues framed by petitioners' Questions 1 and 2.

Certain miscellaneous arguments of the municipal respondents (some also urged by the intervenor respondent) bear brief comment: *First*: Respondents contend that petitioners did not adequately seek or preserve their right to an evidentiary hearing in the motion court. In this they plainly err, since under New York law the existence of a triable issue of fact, without a request, creates the right to a hearing (*Jerkins Truck & Equipment v. City of Yonkers*, 130 A.D.2d 576, 515 N.Y.S.2d 516 [1987]; *Gross v. Board of Education*, 94 A.D.2d 796, 463 N.Y.S.2d 47 [1983]; *Bay Ridge Diagnostic & Analytical Laboratory v. Smith*, 71 A.D.2d 889, 419 N.Y.S.2d 638 [1979]). Furthermore, the motion court here not only expressly refused to hold a hearing on a specific issue to which respondents refer, but even ruled, erroneously, that it was not empowered to hold one on *any* matter in an administrative review proceeding (see Pet. at 5). But even if the right to an evidentiary hearing were not preserved, the essential constitutional requirement of evaluating the relevant factors remained. Respondents cannot credibly argue that any court evaluated them, and, indeed, neither the motion court nor the Appellate Division purported to have done so.

The intervenor's assertion that the courts below allegedly indeed made the "ad hoc, factual inquiries" (*Penn Central* at 124) required by numerous decisions of this Court is simply wrong. The Appellate Division did not do it (see its one-

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7 It should also be noted that the municipal respondents err when they characterize (Mun. Res. Br. 20) the Appellate Division's opinion as construing *Penn Central* to be disposing of a *facial* attack on the ordinance. What the Appellate Division said (Pet. App. 7a), in discussing petitioners' *as-applied* challenge, was that "Since the Supreme Court in *Penn Central* . . . clearly ruled that *the application of* the landmarks law does not affect a taking of property, the constitutional challenge thereby is resolved" (emphasis supplied). The application of *Penn Central* to bar an as-applied Takings Clause challenge to a landmark designation, as the Appellate Division clearly here did, is precisely the issue presented in Question 1 of the petition herein.

sentence evaluation at Pet. App. 6a); and the motion court did not do it—indeed, it even refused to make a factual determination necessary to such consideration (Pet. App. 27a). The intervenor's argument that petitioners never made a factual showing is clearly erroneous, as the motion court (*id.*) and the Appellate Division (*id.* 4a) both discussed petitioners' showing,[8] without however, finding petitioners to be right or wrong.

Second: Respondents' reliance on the guidelines has already been dealt with (*see* Pet. 4 n.5). Respondents do not contend there is any legal requirement for the Commission to adhere to the guidelines, nor that any legal requirement prevents the guidelines from being revoked or abandoned. The guidelines at most tolerate only temporary, reversible modifications, which must be reversed at the owner's expense, and ultimately do not relieve the owner of the statutory requirement of maintenance of the landmark in an unaltered condition as at the moment of designation.

RECONSIDERATION OF *PENN CENTRAL* IS APPROPRIATE

The petition herein suggested two reasons why reconsideration of *Penn Central* would be appropriate: (i)The majority opinion in *Penn Central* erred, as later developments proved, in its belief that the owner of the designated property was benefited in that the landmarking in question was pursuant to a comprehensive plan according an average reciprocity

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8 Compare the intervenor's assertion (Br. 15n) of petitioners' "mistaken and wholly unsubstantiated premise that interior landmarks burden theatre productions" with the motion court's discussion (Pet. App. 27a) of petitioners' affidavit by an expert "with eminent credentials in the field of theatre and stage design" that "interior designations and regulations are incompatible with the requirements of good and efficient theatre and stage design."

of advantage;[9] and (ii)that which the majority opinion saw as a comprehensive plan clearly does not meet the description.[10]

As to the first reason, the intervenor respondent asserts (Int. Res. Br. 26) that the proposition is incorrect, but offers neither authority of its own nor a counteranalysis of petitioners' authority. Of more significance is the position of the municipal respondents, who do not even deny that a comprehensive plan is wholly absent from New York City's landmarks ordinance, and instead argue (Mun. Br. 35-36) that the notion of a comprehensive plan is irrelevant. The municipal respondents thereby confirm what petitioners have been arguing, namely that the New York courts hold there is no comprehensive plan in the ordinance in question, because they do not believe (nor do the municipal respondents believe) that one is required. Since both the majority and the dissenters in *Penn Central* clearly thought such a plan was indeed necessary, the error in *Penn Central* is manifest.

As to petitioners' second point, that the "plan" discerned by the *Penn Central* majority in the ordinance (although it was never actually there) is contrary to the notion of a "comprehensive plan" as developed in the decisions of the highest courts of States throughout this country, neither brief in opposition seeks to argue that the spasmodic approach to landmarking provided for under the ordinance in question is anything but "piecemeal landmarking", which, like piece-

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9 Significantly, in its brief on the merits in *Penn Central*, the City expressly conceded (p. 19) that "The [New York] Court [of Appeals] . . . did not see individual designations as being pursuant to a comprehensive plan."

10 Respondents' fears as to the consequences of review of *Penn Central* are, to say the least, exaggerated. Zoning laws will not be called into question, because they universally already follow comprehensive plans. Numerous landmark laws also will not be called into question, for as Justice (now Chief Justice) Rehnquist noted in dissent in *Penn Central* (438 U.S. at 152n), "many States and cities in the Nation have chosen to preserve landmarks by purchasing or condemning restrictive easements over the facades of the landmarks and are apparently quite satisfied with the results."

meal zoning, is antithetical to the notion of a comprehensive plan. Respondents do not eliminate the due process and equal protection concerns treated in a comprehensive plan (see Pet. i and 14) by merely limiting their briefs to takings jurisprudence.

THE SPECIAL DEMOLITION PERMIT REQUIREMENT CONSTITUTES UNCONSTITUTIONAL REVERSE SPOT-ZONING

The appropriateness of respondents' ripeness arguments in opposition to petitioners' facial challenge to the Special Demolition Permit requirement has already been discussed (*supra*, p. 2). Moreover, respondents' contention (Mun. Res. Br. 38) that the City Planning Commission is permitted, but not required, to condition issuance of the permit on the applicant's agreement to allocate a certain portion of any new structure to entertainment-related uses, is flatly belied by the plain language of the Zoning Resolution (§ 81-742[c][2]], Pet. App. 82a), which makes the condition compulsory.

In response to the merits of petitioners' challenge, respondents seek to support the permit requirement by asserting that an alleged underlying comprehensive plan for the zoning ordinance saves it from illegality (Mun. Res. Br. pp. 39-40). This assertion fails for two reasons. *First*: An illegal spot-zoning amendment to an existing valid zoning ordinance is not saved merely because it is an amendment to an otherwise valid ordinance (*Chrobuck* v. *Snohomish County*, 78 Wash.2d 858, 480 P.2d 489 [1971]; *Heaney v. City of Oshkosh*, 47 Wis.2d 303, 177 N.W.2d 74 [1970]; *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 [1968]; *Speakman* v. *Borough of North Plainfield*, 8 N.J. 250, 84 A.2d 715 [1951]). *Second*: In traditional spot-zoning situations, the private property owner is benefited by the discriminatory zoning provision. The existence of a comprehensive plan ensures that the public is not victimized by conduct benefiting a private property owner unrelated to an overall legitimate public purpose. By stark contrast, in the reverse

spot-zoning situation, the private property owner suffers an economic loss in order that the public may receive some benefit. Thus, the existence of a comprehensive plan in the reverse spot-zoning context is meaningless, in that it provides no protection for the legitimate rights of the property owner and cannot justify the discriminatory conduct.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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